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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

WILLIAM W. BIERCE, LIMITED, A CORPORATION,
Appellant,

vs.

CLINTON J. HUTCHINS, TRUSTEE,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE
TERRITORY OF HAWAII.

CHICAGO:
THE GUNTHORP-WARREN PRINTING CO.
116-118 E. Randolph Street

IN THE

Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1904.

WILLIAM W. BIERCE, LIMITED, a Corporation,
Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee,
Defendant.

REPLEVIN.

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IN THE

Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1904.

WILLIAM W. BIERCE, LIMITED, a Corporation, *Plaintiff,* *vs.* **CLINTON J. HUTCHINS, Trustee,** *Defendant.*	**REPLEVIN.**

TRANSCRIPT OF RECORD.

1 Be It Remembered, That Heretofore, to-wit, on the 10th day of June, A. D. 1904, as of the 19th day of April, A. D. 1904, there was certified and sent up to the Supreme Court of the Territory of Hawaii a certain Bill of Exceptions in an action lately pending in the Circuit Court of the First Judicial Circuit of said Territory (having been transferred thereto from the Circuit Court of the Third Judicial Circuit of said Territory), in which William W. Bierce, Limited, a corporation, was plaintiff, and Clinton J. Hutchins, Trustee, was defendant, which said Bill of Exceptions, now remaining on file and of record in the office of the Clerk of said Supreme Court, is in the words and figures following, to-wit:

2 IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT.

(Transferred to First Judicial Circuit)

Territory of Hawaii.

W. W. Bierce, Limited,
Plaintiff,
vs.
C. J. Hutchins, Trustee,
Defendant.
} Replevin.

BILL OF EXCEPTIONS.

Be it remembered that the above entitled cause came on regularly for trial in the above entitled court on the 7th day of March, A. D. 1904, Honorable J. T. De Bolt, Presiding, and the jury having been waived; Kinney, McClanahan & Cooper and S. H. Derby, appearing for the plaintiff, and John W. Cathcart and Castle & Withington and W. L. Whitney, appearing for defendant:

Thereupon proceedings were had and testimony taken in said cause, and the following exceptions were duly taken and reserved by said defendant upon said trial; and said defendant now presents, serves and files said exceptions as contained in this Bill of Exception, and the exceptions upon which he relies herein, and because of which he prays the reversal and annullment of the judgment herein.

3 EXCEPTION NO. I.

Upon the above entitled cause being called for trial on the 7th day of March, A. D. 1904, the plaintiff presented the following motion and asked leave to amend its complaint herein:

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT,

Territory of Hawaii.

December 1903 Term.

William W. Bierce, Limited, A corporation,
Plaintiff,
vs.
Clinton J. Hutchins, Trustee,
Defendant.
Replevin.

MOTION TO AMEND.

Now comes the above named plaintiff, by its attorneys Kinney, McClanahan & Cooper, and moves to amend its complaint heretofore filed herein as follows:

In paragraph 5 on the third page of said complaint on the first and second line of said paragraph, strike out the words "a supplementary contract in writing was," and insert in lieu thereof the words, "said agreement of February 21, 1900, was adjusted and settled by a contract in writing."

In paragraph 6 on the fourth page of said complaint, on the second line of said paragraph striking out the word, "supplementary" and adding after the word "contract" on said line, the words "of March 13th, 1901."

In paragraph 7 on the fifth page of said complaint on the
first line of said paragraph, strike out the word "sup-
4 plementary," and add after the word "contract" on said
line the words "of March 13th, 1901."

In paragraph 14 on the seventh page of said complaint strike out the words "Fifteen Thousand Dollars" and repeated numerals in brackets, and add in lieu thereof the words, "Twenty Thousand Dollars."

This motion is based on the records, and the affidavit of E. B. McClanahan attached to and made a part hereof.

Dated March 4th, 1904.

KINNEY, MCCLANAHAN & COOPER,
Attorneys for W. W. Bierce, Ltd.

Defendant opposed the granting of said motion and after argument said court allowed the same and granted leave to said plaintiff to amend its complaint as in said motion asked and requested, to which ruling of the court defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

EXCEPTION NO. II.

In pursuance of a stipulation made and filed in said cause, counsel for plaintiff proceeded to read in evidence the deposition of Columbus Bierce, and during the reading of said deposition the following occurred:

Mr. Cathcart. I move to strike out the conclusions of certain portions of the answer. (Referring to answer to 25th interrogatory) I will have to read a little in advance. "All efforts to collect anything on this note having failed and the collateral having apparently become worthless, William W. Bierce, Limited, about January 1st, 1903, instructed its attorneys Messrs. Kinney, Ballou & McClanahan, to proceed by all lawful means to recover back for William W. Bierce,
5 Limited, the possession of the goods in question, conditionally delivered to the Kona Sugar Company, Limited, as the property of William W. Bierce, Limited." I move to strike out the words "conditionally delivered to the Kona Sugar Co. Ltd., as the property of William W. Bierce, Ltd." His answer here shows a conclusion of law.

I further move to strike out all that part with reference to what he instructed—what William W. Bierce, Ltd., about January 1st, 1903, instructed its attorneys to do, on the ground, if the court pleases, that it is not the best evidence of what he says here. It is in writing and should be put in evidence—read in evidence.

The Court. I think he is testifying to a fact there. Motion to strike out will be denied.

Mr. Cathcart. Exception. (Stenographer's Notes, p. 3-4.)

Defendant having duly excepted to said ruling of the court, the said ruling is here and now assigned as error by said defendant.

EXCEPTION NO. III.

Immediately thereafter and during the reading of the answer to interrogatory 26 in the deposition of Columbus Bierce aforesaid, the following occurred:

Mr. Cathcart. I would like to make the same motion in regard to the answer to interrogatory 26, asking that all, this part of the answer be stricken out on the ground it is a conclusion of law: "holding it as the property of William W. Bierce, Ltd., until fully paid for."

The Court. I think it is the same. The motion to strike will be denied.

Mr. Cathcart. Exception. (Stenographer's Notes, p. 4.)

6 To which ruling of the court the defendant duly excepted, and said defendant now assigns said ruling as error.

EXCEPTION NO. IV.

Thereafter and during the reading of the deposition of Columbus Bierce, aforesaid, counsel for plaintiff read interrogatory 40 as follows:

INTERROGATORY 40TH.

If in answer to the last preceding interrogatory you have stated, among other things, that during the middle and latter part of the year 1902, you were informed by your attorneys in Honolulu, Messrs. Kinney, Ballou & McClanahan, that they, acting as your attorneys, had given notice of a claim of lien and had subsequently instituted an action on said lien against the rails, engines, cars and other railroad equipment referred to in the preceding interrogatories, which were at that time in the possession of the Kona Sugar Company, Limited, state what information or belief, if any, William W. Bierce, Limited, had, at the time they were notified that a lien had been filed in regard to the rights of the Kona Sugar Company, Limited, in and to the land over which the plantation railroad ran.

And the following then occurred:

Mr. Cathcart. I desire to object to that.

Mr. McClanahan. Object to what, the question?

Mr. Cathcart. Yes. I have no objection to the court reading the answer, if the court wishes to, I merely would like to put in my objection now as incompetent, irrelevant and immaterial, then the answer and then I can move to strike it out. The question is "State what information or belief, if any, William W. Bierce, Ltd., had at the time they were notified that a lien had been filed in regard to the rights of the
7 Kona Sugar Company, Limited, in and to the land over which the plantation railroad ran."

Mr. McClanahan. I want to show that the Kona Sugar Company, had no title to the land and therefore our remedy was ineffective and abortive and we are not estopped by virtue of bringing that. (Referring to mechanic's lien.)

Mr. McClanahan. If I may be allowed I would say that we are going to be charged in this case, I suppose, with an election of remedies. Now if that be so it will become very important for this court to know the state of information resting within our knowledge when we did so elect, as it is going to be charged.

(Argument)

The Court. That question and the answer will not be really considered evidence. It will not be considered by the court at this time, but if it appears later that it is proper to consider it, I will do so. As it now appears to me it seems to be immaterial. The title to the land has nothing to do with this case. If the materiality does not later appear, why then of course it is—your objection will be sustained—or I can sustain the objection now, with the understanding that the objection—

Mr. Cathcart. I would like to have the court do that, because if it is read now—

The Court. Well then the objection will be sustained, however, giving plaintiff an opportunity to offer it later if the materiality of it appears.

Mr. McClanahan. I will make this offer then: It appears to the court to be immaterial. Now I ask that it be allowed to go in and will prove it to be material.

8 The Court. I was expecting you would make that offer all along. Well then it may be read with the offer of counsel to show the materiality. If it does not appear then I will entertain a motion to strike it out.

(Answer read)

Mr. Cathcart. I move to—I suppose I have got to move to strike out a part of this. Take all that part of the answer which says, "And under all the circumstances it was a reasonable and necessary inference on our part,"—from that to the end of the answer, if the court please. I move to strike it out on the ground that it is incompetent, irrelevant and immaterial and a conclusion.

The Court. I think the whole answer simply amounts to this: That the plaintiffs had good reason to believe and did believe that is what it amounts to.

Mr. McClanahan. If the evidence is going to be material it is going to be to show the condition of the mind of the plaintiff in making this election.

The Court. I think upon that ground the motion to strike will be denied.

Mr. Cathcart. Exception. (Stenographer's Notes, 5-6-7.)

Which ruling of the court was duly excepted to by defendant and said ruling is here and now assigned as error by said defendant.

EXCEPTION NO. V.

Thereupon counsel for the plaintiff read the 41st interrogatory propounded to said Columbus Bierce, as follows:

Interrogatory 41st. State what information or belief, if any, William W. Bierce, Limited, had at the time they were notified that an action had been begun on said lien against the railroad equipment, etc., referred to in the last preceding interrogatory.

9 And thereupon the following occurred:

Mr. McClanahan. (Continues reading. Reads 41st interrogatory.)

Mr. Cathcart. If the court please I make the same objection to this—incompetent, irrelevant and immaterial.

Mr. McClanahan. We make the same offer.

The Court. Seems to be the same.

Mr. Cathcart. Exception. (Stenographer's Note p. 7.)

To which ruling of the court defendant duly excepted and said ruling is here and now assigned as error by said defendant.

EXCEPTION NO. VI.

Thereupon interrogatory 42d propounded to said Columbus Bierce was read by plaintiff as follows:

Interrogatory 42d. If in answer to the last two preceding interrogatories you have stated that at the times therein referred to William W. Bierce understood and believes that the plantation railroad of the Kona Sugar Company, Limited, which railroad was made up by the rails, engines, cars, etc., referred to in these interrogatories, state what, if any, understanding or belief William W. Bierce has upon that subject at the present time.

And thereupon the following occurred:

(Mr. McClanahan reads 42d interrogatory.)

Mr. Cathcart. I object to that as incompetent, irrelevant and immaterial.

Mr. McClanahan. I was going to make this offer: We will prove that this state of affairs and this knowledge and information on the part of W. W. Bierce at this time was also had at the time of the discontinuance of the mechanic's lien suit. We will make that offer to prove that.

10 The Court. I think it has some bearing. The objection overruled.

Mr. Cathcart. Exception. I suppose it is accepted subject to the same offer to make it material?

Mr. McClanahan. Yes, and further that we are going to make this showing. (Stenographer's Notes, p. 7-8)

Said ruling of the court having been duly excepted to by defendant, the said ruling is here and now assigned as error by said defendant.

EXCEPTION NO. VII.

Thereupon the answer to the 42d interrogatory propounded to said Columbus Bierce was read in evidence as follows:

Answer to Interrogatory 42. Our understanding and belief that the plantation railroad in question of the Kona Sugar Company, Limited, was constructed upon land the title to which was held by the Kona Sugar Company, Limited, existed until about the first of January 1903, when our Chicago counsel, Mr. H. W. Prouty, upon his return from his trip to Honolulu, in connection with this case, told us that he had learned, while in Honolulu, that the Kona Sugar Company, Limited, held no title whatsoever and never had held title, in any form, to the land on which this plantation railroad was constructed, and over which it ran, and according to the best information we have been able to obtain, appeared to have been and still to be a trespasser thereon, in constructing and operating its railroad on the land, greatly to our astonishment and contrary to all the information we had previously received on the same subject. At about the same time we were advised to the same effect by letters received in the usual course of mail in our office in Chicago, from our Honolulu counsel, Messrs. Kinney, Ballou & McClanahan. In the wildest flights of our imagination
11 we had never imagined that anybody other than an
idiot or an insane man would attempt to build a railroad without title to or right of way over the land whereon the railroad was to be constructed, and as soon as our previous misinformation on this subject had been corrected by the information first received by us on about the first of January, 1903, from Mr. Prouty and from Messrs. Kinney, McClanahan &

Bigelow, in the manner as I have stated, that this identical thing had been done in the case of the plantation railroad in question of the Kona Sugar Company, Limited, viz., the improvident and insane construction and operation of its railroad on land to which it held no title and over which it never had any right of way whatsoever, we promptly instructed our Honolulu attorneys, Messrs. Kinney, McClanahan & Bigelow, to dismiss the suit brought and claim filed by them for the purpose of enforcing the mechanic's lien on the railroad in question, for the balance of the contract price of the railroad equipment, to which I have previously referred in my testimony.

And the following occurred:

Mr. Cathcart. Now I move to strike out the portions of the answer which I will read: Strike out all that portion of the answer commencing: "At about the same time we were advised to the same effect by letters received in the usual course of the mail in our office from our counsel—Honolulu counsel, Messrs. Kinney, Ballou & McClanahan," on the ground it is not the best evidence. The letters themselves speak for what the Honolulu office advised; and strike out—strike it all out, on the ground that it is argumentative and that it appears that it is hearsay, and showing no facts whatever as to the title—as to the title of any—as far as any positive information they had received at this time as to the title.

12 Mr. McClanahan. We admit that it is hearsay, but it does not come within the rule of hearsay. It is not offered for the purpose of establishing a fact, it is offered for the purpose of showing the information which we had.

The Court. It shows a basis upon which the action—

Mr. McClanahan. Exactly.

The Court. Well, the motion will be denied.

Mr. Cathcart. Exception. (Stenographer's Notes, p. 8.)

Said ruling of the court was then and there duly excepted to and defendant now assigns said ruling as error.

EXCEPTION NO. VIII.

In pursuance of a stipulation made and filed in said cause the deposition of Alexander Lindsay, Jr., was read by the plaintiff in evidence and during the reading of said deposition the following questions and answers were read:

A. I was engaged by the firm of Kinney, McClanahan & Bigelow to proceed to Kona, and at the auction sale of the

Kona Sugar Company, Limited, Estate, which was proposed, I was instructed to make a protest on behalf of William W. Bierce Company, Limited, against such sale.

Q. What was this sale—what was the nature of the sale? A. It was the receiver's sale made under order of the Judge of the Third Circuit Court.

Q. Did you make such protest? A. I did.

Q. In what form did you make it? A. After the auctioneer stated the purpose of the sale, I then read aloud a notice that I had with me protesting against that sale.

Q. Would you recognize a copy of the notice if shown you? A. I would.

13 Q. Do you know where the original is? A. The original I handed to the agent of the purchaser.

Mr. McClanahan. I hand you a paper and ask if you can identify it.

A. No, I can't.

Mr. McClanahan. I hand you another paper and ask if you can identify it.

A. Yes, this is a copy of the notice that I read immediately preceding this sale, and immediately after the sale. I read it twice.

Q. Who did you read it to immediately following the sale? A. Immediately following the sale—

Mr. Cathcart. I object to that as incompetent, irrelevant and immaterial as to what he did after the sale.

Q. Who did you read it to after the sale?

Thereupon the following occurred:

Mr. Cathcart. I object to that as incompetent, irrelevant and immaterial as to what he did after the sale.

Mr. Cathcart. I insist on that objection.

Mr. McClanahan. It is part of the res gestae.

The Court. Objection overruled.

Mr. Cathcart. Exception.

Said ruling of the court being duly excepted by defendant the same is here and now assigned as error by said defendant.

Thereupon the answer of Alexander Lindsay, Jr., was read in evidence as follows:

A. To Robert W. Shingle, who had bid in the place and when thé place was knocked down that he had purchased for C. J. Hutchins, Trustee.

EXCEPTION NO. IX.

Thereupon the following occurred:

14 Mr. McClanahan. I call upon the defendant to produce the minutes.

We now tender, for the benefit of whom it may concern, bonds numbered one to 76—

The Court. These are the bonds—

Mr. McClanahan. Of the Kona Sugar Co., Ltd., each in the sum of $500 held by us heretofore as collateral security.

We also tender, for whom it may concern, the note of the Kona Sugar Co., Ltd., in the sum of $37,044.53.

Mr. Cathcart. We object on the ground that it is incompetent, irrelevant and immaterial. I suppose the purposes of this tender are that the plaintiff is treating this contract as an executory sale and they are claiming that they have rescinded it, are making the tender so as to restore the Kona Sugar Co., to the statute in quo. The tender should have been made at the time of the recision of the sale—recision of the executory agreement to sell, whenever that was; and further it is incompetent, irrelevant and immaterial because the full tender of the consideration passed on this executory agreement to sell has not been tendered into court. There is $10,000 that they admitted to have received.

(Argument.)

The Court. Objection overruled.

Mr. Cathcart. Exception. (Stenographer's Notes, p. 14-15.)

Said exception was then and there allowed by said court and said ruling of the said court is here and now assigned as error by said defendant.

EXCEPTION NO. X.

Thereafter one Henry Smith having been called as a witness for the plaintiff and being duly sworn to testify in said cause, the following occurred:

15 Mr. McClanahan. I suppose that it is admitted that Mr. Smith is Clerk of the Judiciary Department?

Mr. Cathcart. Yes.

The Witness. The question is, "I hand you a book and ask you whose property it is?" It belongs to the Supreme Court, Judge.

"In whose possession has it at this time been taken from?"

It was in my possession as Librarian of the Supreme Court.

"Who was it received from when it came into the custody and possession of the Court?" It came in my possession.

"Who from?" The Secretary of State of Louisiana.

Mr. McClanahan. That is all. I offer—

The witness. I will qualify. It so happens that this state we are treating only with the Secretary of State. There are other states I treat with the Secretary of State, or a Clerk of court, or a state librarian, but in this case, Louisiana, is the Secretary of State, is the only officer who sends to me and I send to him in exchange, so—

Mr. McClanahan. I offer in evidence Act 36 of the regular session of the general—of the Acts and Resolutions passed by the General Assembly of the State of Louisiana, begun and held at the City of Baton Rouge on the 14th day of May, A. D. 1888, and which adjourned on Thursday the 12th day of July, A. D. 1888 and identified by the witness, being the Act under which this corporation received its charter.

Mr. Cathcart. Q. When did you receive this book? A. It is stated on the leaflet, October 19th, 1901, I received five or six other books besides this at the time.

Mr. McClanahan. That's all, I have offered it.

Mr. Cathcart. I object on the ground that it is incom-
16 petent, irrelevant and immaterial; that it is not proof of
anything—of any law under which this company is incorporated so far as I can see, to show what the law is relative to the incorporation of companies in the State of Louisiana, of corporations in the State of Louisiana.

Mr. McClanahan. It is offered to show the law under which this company was incorporated. It certainly shows a de facto corporation. Whether the law was complied with or not it shows a de facto corporation.

(Argument.)

The Court. This is in evidence anyway, the law. The court will receive it as far as it goes.

Mr. Cathcart. Exception.

The Court. Of course it don't yet say that it establishes the fact of corporation.

(Stenographer's Notes, p. 20-21.)

Said exception was then and there allowed by said court and said ruling of the court is here and now assigned as error by said defendant.

EXCEPTION NO. XI.

Thereafter during the progress of said trial one W. W. Bierce was called as a witness in behalf of the plaintiff and having been duly sworn the following occurred in reference to the incorporation of plaintiff:

Mr. McClanahan. Q. Has W. W. Bierce, Ltd., acted or not as a corporation?

Mr. Cathcart. I object to it as incompetent, irrelevant and immaterial, not the best evidence to show any incorporation.

The Court. "Acted," you are speaking generally.

Mr. McClanahan. Yes sir.

17 The Court. Objection overruled.

Mr. Cathcart. Exception. (Stenographer's Notes, p. 30.)

Said exception was then and there allowed by said court and said ruling of the court is here and now assigned as error by said defendant.

And thereupon the following occurred:

The Court. Understand the ruling though. I do not yet hold that that proves the corporation. I think it is admissible.

A. We have acted as a corporation entirely since our corporate papers were taken out and having done business in nearly all countries.

The Court. What date was that, Mr. Bierce?

A. 23d of December, 1899.

Q. Since that date you have acted as a corporation? A. Yes, entirely so.

(Stenographer's Notes, p. 30.)

Said exception was then and there allowed by said court and said ruling of the court is here and now assigned as error by said defendant.

EXCEPTION NO. XII.

Immediately thereafter and in reference to the proof of the incorporation of plaintiff, the following occurred:

Mr. McClanahan. If the court please, it is proper at this stage of the proceedings, we can and are now prepared to ask the question, which has not been brought up except in a dilatory way before, as to whether this defendant can raise this question or not.

(Argument.)

The Court. What I want to know is whether Mr. Hutchins would be estopped because the Kona Sugar Co. is estopped.

(Argument.)

18 The Court. My view is in the light of the argument and authorities cited, that the defendant, Mr. Hutchins, is estopped by reason of the dealings of the Kona Sugar Co., with the plaintiffs as a corporation, and that he cannot now be heard to deny their corporate existence.

Mr. Cathcart. An exception to the ruling of the court. (Stenographer's Notes, p. 30-31.)

Said exception was then and there duly allowed by said court and said ruling of the court is here and now assigned as error by said defendant.

EXCEPTION NO. XIII.

Upon the plaintiff having rested its case defendant moved to strike out the answer to interrogatory No. 40 propounded to Columbus Bierce and read in evidence in plaintiff's case, said interrogatory and answer being as follows:

INTERROGATORY 40TH.

If in answer to the last preceding interrogatory you have stated, among other things, that during the middle and latter part of the year 1902 you were informed by your attorneys in Honolulu, Messrs. Kinney, Ballou & McClanahan, that they, acting as your attorneys, had given notice of a claim of lien, and has subsequently instituted an action on said lien against the rails, engines, cars and other railroad equipment referred to in the preceding interrogatories, which were at that time in the possession of the Kona Sugar Company, Limited, state what information or belief, if any, William W. Bierce, Limited, had at the time they were notified that a lien had been filed in regard to the rights of the Kona Sugar Company, Limited, in and to the land over which the plantation railroad ran.

Answer to Interrogatory 40th. At the time William W. Bierce, Limited, were informed by Messrs. Kinney, Ballou & McClanahan that they had filed a mechanic's lien 19 claim in our behalf, as stated in my answer to the last preceding interrogatory we had considerable information which seemed to point conclusively to the fact that the Kona Sugar Company, Limited, owned the land on which the rails, cars, locomotives, scales and other material supplied by us, as stated in my answer to the foregoing interrogatory, had been installed and used in operating the plantation railroad of the Kona Sugar Company, Limited. This information consisted of statements made to us verbally by Mr. Frank Davies and Mr. Harry T. Gilbert, after they had visited the islands as our representatives, to the effect that the goods in question were to be used in building, constructing and operating the railroad of the Kona Sugar Company, Limited, on the Kona plantation of the Company, and later that the same had been so used and that the Kona Sugar Company, Limited, was operating this railroad on and as an essential part of a large sugar plantation located in Kona district, in the Island of Hawaii, of which plantation it was the owner. We received like information from time to time from Messrs. Kinney, Ballou & McClanahan, and under all the circumstances it was a reasonable and necessary inference on our part that the Kona Sugar Company, Limited, either held the title in fee simple to the land on which the plantation railroad was constructed or held a long term written lease thereof, or had otherwise acquired a satisfactory title to the land in the shape of a written conveyance of right of way or equivalent rights and title by condemnation proceedings, which is a usual and familiar mode of acquiring title to land for use as a railroad right of way in all parts of the United States.

And thereupon the following occurred:

Mr. Cathcart. At this time I desire to make a motion to strike out of the evidence certain portions of the deposition of W. W. Bierce—of Columbus Bierce—which was read in the early part of yesterday during the trial. The question is contained in the 40th interrogatory, in which it reads as follows: "If, in answer to the last preceding interrogatory you have stated, among other things, that during the middle . . . . . . ran." I objected to that as being incompetent, irrelevant and immaterial. The court overruled my objection. The answer was read and I moved to strike it out. I think at the time, the court held, however, that he would allow it to remain in for the time being until it was connected up and made material by the plaintiff. Now I base this motion more particularly upon the ground that it is shown by his preceding answer to interrogatory 39 that the Bierce Co. turned the matter, the note and the collateral and agreements "referred to in my testimony (reads) . . . as they might deem advisable under all the circumstances." (Argues.) So it shows, according to Columbus Bierce's own testimony that this whole matter was placed unreservedly in the hands of

Kinney, Ballou & McClanahan who were on the scene of action. Now if that is so, it also appears in the testimony—by the testimony of Mr. W. W. Bierce, that this same firm not only were their attorneys at law but were their attorneys in fact. If these things were so, then it is absolutely immaterial what W. W. Bierce—what information they had relative to the rights of the Kona Sugar Co., Ltd., in the land. (Argues.)

The Court. Well I think that the understanding between principal and agent, while the matter may be left, broadly
speaking, entirely to the agent, still the principal does not
21 give up his control and management of the affairs, and
I think that we must presume that they consult together
and advise together. A principal may offer some suggestion, perhaps. Therefore the motion to strike will be denied.

Mr. Cathcart. I save an exception to the ruling of the court.

(Stenographer's Notes, p. 75-76.)

Said defendant duly excepted to the ruling of the court and said ruling is here and now assigned as error by said defendant.

EXCEPTION NO. XIV.

Immediately thereafter defendant moved to strike out the answer to interrogatory No. 41 of the said Columbus Bierce said interrogatory and answer being as follows:

Interrogatory 41st. State what information or belief, if any, William W. Bierce, Limited, had at the time they were notified that an action had been begun on said lien against the railroad equipment, etc., referred to in the last preceding interrogatory.

Answer to Interrogatory 41st. At the time William W. Bierce, Limited, were informed that an action had been begun to enforce such mechanic's lien, in its belief, against the railroad and railroad equipment referred to in the last preceding interrogatory and my answer thereto, they had the same information and belief as mentioned in my answer to the last preceding interrogatory.

Thereupon the following occurred:

Mr. Cathcart. I make a like motion in reference to Interrogatory 41 and the answer to Interrogatory 41 (Reads)

The Court. Well the same ruling of the court applies.

Mr. Cathcart. And exception, if the court please.

(Stenographer's Notes, p. 76.)

22 Said ruling of the court was duly excepted to by defendant and the same is here and now assigned as error by said defendant.

EXCEPTION NO. XV.

Thereafter and during the progress of said trial the witness M. F. Scott was called in behalf of said defendant, and being duly sworn to testify in said cause, the following occurred:

Q. Mr. Cathcart. Are you familiar with the material constituting the railway down there, rolling stock, rails, etc.? A. Yes, I am quite familiar with it.

Q. Can you state what is the condition of the railway material including all rolling stock, the rails, etc.?

Mr. McClanahan. I object to that. If it is an attempt to prove the value of the rolling stock I submit that this witness is not qualified as an expert to prove the condition or prove the value by showing its condition.

Mr. Cathcart. I am not trying to prove the value.

Mr. McClanahan. Well then it is immaterial.

Mr. Cathcart. It is material as to deterioration.

Mr. McClanahan. This witness has not qualified to testify as to the deterioration of railway material.

The Court. Objection sustained.

Mr. Cathcart. Exception. (Stenographer's Notes, p. 79.)

Said exception was then and there duly allowed by said court and said ruling of the court is here and now assigned as error by said defendant.

EXCEPTION NO. XVI.

Immediately thereafter and as a continuation of the testimony taken and proceedings had, which are set out in the
23 preceding exception, the following occurred:

Mr. Cathcart. Q. Now state, if you can, what, if any, difference there is in the material, its appearance, and, for instance, whether the rails appear more worn whether the engines work less well now than on the day we took possession of it.

Mr. McClanahan. I object to that, not having laid the foundation for testifying as an expert.

The Court. Objection sustained.

Mr. McClanahan. I ask the court instead of maintaining my objection to grant my motion to strike out the answer of Mr. Scott. There is a motion to strike.

The Court. Very well the motion then will be granted.

Mr. Cathcart. Exception. (Stenographer's Notes, p. 82.)

Said exception was then and there duly allowed by said court and the ruling of said court is here and now assigned as error by said defendant.

EXCEPTION NO. XVII.

At the conclusion of the trial of said cause and before rendition of judgment therein the defendant moved for judgment and the following proceedings were had and occurred:

Mr. Cathcart. I will now make a motion for judgment for the defendant on the ground that it appears from the evidence in the case that this was not a conditional sale as claimed by the plaintiff but was a chattel mortgage; on the ground that if it was a conditional sale, then the plaintiff by this action has elected to treat it as an absolute sale and is not entitled to recover the property in this action by a suit of replevin.

The Court. The motion will be denied.

(Stenographer's Notes, p. 82.)

To which ruling of the court the defendant then and there excepted and said exception was duly allowed, and said
24 ruling of said court is here and now assigned as error by said defendant.

EXCEPTION NO. XVIII.

Thereafter and at the conclusion of argument by counsel for plaintiff and for defendant, the court found judgment in favor of the plaintiff and against the defendant and the following proceedings were had and occurred:

The Court. I therefore find judgment for plaintiff to recover the property as set forth in the complaint and upon failure to so recover it to be entitled to recover its value which I find to have been $22,000 on the first day of June, 1901, and by way of damages recover interest on the said sum of $22,000 at the rate of six per cent. from the first day of June, 1901, up to the date of the judgment. Of course costs and all. Mr. McClanahan you can prepare what you consider the necessary facts leading to this conclusion and counsel may present them and I will give you a hearing upon them if you see fit.

Mr. Cathcart. The court will allow me to except to the judgment of the court as being contrary to the law and evidence and against the weight of evidence, and give notice of motion for new trial.

The Court. Exception is noted.

(Stenographer's Notes, p. 85-86.)

Said exception was then and there allowed by said court and the ruling of said court is here and now assigned as error by said defendant.

EXCEPTION NO. XIX.

Thereafter and in pursuance of the direction of the court the plaintiff presented to said court certain Findings of Fact and Conclusions of Law, to which objections were made
25 by said defendant, and thereupon the following proceedings were had:

Mr. Milverton: In the Bierce case I would like to have the firm of Cathcart & Milverton to be entered as attorneys for the defendant in the place of J. W. Cathcart.

The Court. It is so ordered.

(Findings of Fact read, also Conclusions of Law.)

Mr. Milverton. May it please the court in view of the fact that most of the questions raised by these objections have been at some time during the progress of the trial passed upon by your Honor I do not intend to make any argument upon them, but merely present them and possibly make some slight argument as to some new points that are now raised for the first time. The objections to the finding of fact are as follows: (Reads first objection.)

The Court. Will we dispose of the objection as we go along?

(Stenographer's Notes, p. 90.)

Plaintiff proposed the following finding:

That on March 13th, 1901, plaintiff and the Kona Sugar Company, Limited, entered into the contract of that date attached to plaintiff's complaint as Exhibit "A."; to which defendant objected as follows:

Defendant objects to the 3d proposed finding of fact upon the ground that the evidence in said action shows that the contract therein referred to was a supplementary contract merely.

Said objection was by said court overruled and the defendant duly excepted to the ruling of the court, and the said ruling of the court is here and now assigned as error by said defendant.

26 EXCEPTION NO. XX.

Immediately thereafter plaintiff proposed the following finding:

That the payment of $10,000 under the contract of March 13th, 1901, and the giving of the note for $37,044.53 secured by the bonds of the Kona Sugar Company, Limited, was intended to be and was in settlement of the contract of February 21, 1900, and said cash and said note and bonds were not given nor were they intended as the consideration for the purchase price of the materials sued for; to which finding the defendant objected as follows:

Defendant objects to the 4th proposed finding of fact upon the ground that the evidence in said action shows that the so called contract of March 13th, 1901, and the giving of securities in connection therewith, was intended to be in settlement of the terms of payment of the contract of February 23d 1900, and not in settlement of the contract itself, and that the cash, note and bonds referred to were intended to be and were given as payment for the purchase price of the material sued for.

The court then and there overruled said objection to which ruling of the court said defendant then and there excepted and said ruling is here and now assigned as error by said defendant.

EXCEPTION NO. XXI.

Immediately thereafter plaintiff proposed the following finding:

That the condition precedent, the performance of which was to divest the plaintiff of title to the property sued for, was intended by the parties to be the payment of the note of
27 $37,044.53 given in settlement of the contract of February
21st, 1900; to which ruling the defendant objected as follows:

Defendant objects to the 5th proposed finding of fact upon the ground that the evidence adduced shows that the payment of the said note of $37,044.53 was not a condition precedent, the performance of which was to divest the plaintiff of the title to the property sued for.

The court then and there overruled said objection to which ruling of the court the said defendant then and there excepted and said ruling is here and now assigned as error by said defendant.

EXCEPTION NO. XXII.

Immediately thereafter plaintiff proposed the following finding:

That the contract of March 13th, 1901, was an entire contract and intended so to be, for a lump sum consideration which consideration was incapable of being appointed so as to make possible the ascertainment of the price of the lienable and nonlienable items thereof; to which finding the defendant objected as follows:

Defendant objects to the 6th proposed finding of fact upon the ground that said so-called finding contains mixed questions of law and fact, and upon the further ground that the evidence in said cause shows that the said contract of March 13th, 1901, was not an entire contract, nor intended so to be, but was a contract supplementary to the contract of February 21st, 1900.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted and said ruling is here and now assigned as error by said defendant.

28

EXCEPTION NO. XXIII.

Immediately thereafter plaintiff proposed the following finding:

That by entering into the contract of March 13th, 1901, the contract of February 21st, 1900, was intended to be settled and adjusted; to which finding the defendant objected as follows:

Defendant objects to the 7th proposed finding of fact upon the ground that the same is ambiguous and unintelligible.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

EXCEPTION NO. XXIV.

Immediately thereafter plaintiff proposed the following finding:

That both the plaintiff and the Kona Sugar Company, Limited, intended said contract of March 13th, 1901, to operate as a conditional sale of the property sued for and not as a chattel mortgage, or an absolute sale with lien reserved in the vendor; to which finding the defendant objected as follows:

Defendant objects to the 8th proposed finding of fact upon the ground that the same is not supported by the evidence in said action.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

EXCEPTION NO. XXV.

Immediately thereafter plaintiff proposed the following finding:

29 That in view of all the circumstances of the case said contract of March 13th, 1901, was a conditional sale and not a chattel mortgage, or absolute sale with lien reserved in the vendor; to which finding the defendant objected as follows:

Defendant objects to the 9th proposed so-called finding of fact upon the ground that the same is a mere conclusion of law.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

EXCEPTION NO. XXVI.

Immediately thereafter plaintiff proposed the following finding:

That some of the property sued for in said action, including railroad rolling stock, was not in fact used in the construction of the railway of the Kona Sugar Company, Limited, and was not lienable; to which finding the defendant objected as follows:

Defendant objects to the 10th proposed finding of fact upon the ground that the same is contrary to and is not supported by the evidence in said action.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

EXCEPTION NO. XXVII.

Immediately thereafter plaintiff proposed the following finding:

That plaintiff did not at any time intend to, nor did it in fact waive its title to the property sued for, nor did it 30 intend to, or in fact make any election of remedies or rights so as to bar the bringing of this action; to which findings the defendant objected as follows:

Defendant objects to the 11th proposed finding of fact upon the ground that the same contains mixed questions of law and fact, and upon the further ground that the same is not supported by the evidence in said action.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

EXCEPTION NO. XXVIII.

Immediately thereafter plaintiff proposed the following finding:

That plaintiff did not intend to and did not in fact waive its title by bringing the action to enforce a material man's lien against the Kona Sugar Company, Limited, and its Receiver; to which finding the defendant objected as follows:

Defendant objects to the 12th proposed finding of fact upon the ground that the same is not supported by the evidence in said action.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

EXCEPTION NO. XXIX.

Immediately thereafter plaintiff proposed the following finding:

That the acts of the plaintiff prior to the bringing of this action did not amount to a recision of the contract of March 13th, 1901, and said contract as a matter of fact has 31 not been rescinded; to which finding the defendant objected as follows:

Defendant objects to the 13th proposed so-called finding of fact upon the ground that the same is a mere conclusion of law.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

EXCEPTION NO. XXX.

Immediately thereafter plaintiff proposed the following finding:

That the defendant attempted to purchase and did in fact take possession of the articles sued for, with knowledge both record and actual, of plaintiff's claim and title thereto; to which finding the defendant objected as follows:

Defendant objects to the 14th proposed finding of fact upon the ground that the same is not supported by the evidence in said action.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

EXCEPTION NO. XXXI.

Immediately thereafter plaintiff proposed the following finding:

That the actual value of said articles sued for was at the time of bringing this action and now is, the sum of $22,000; to which finding the defendant objected as follows:

Defendant objects to the 15th proposed finding of fact upon
the ground that the value of the articles sued for in said
action, and fixed in said finding in the sum of $22,000
32 is in excess of the amount actually claimed by the plaintiff in its complaint and affidavit herein, and upon the
further ground that said finding does not set out the separate
value of each different article comprising the property referred to in said finding.

And after the reading of the last above mentioned objection the following occurred:

Mr. McClanahan. Then we now move to amend the complaint in substituting $22,000 for $20,000 wherever the same appears in the complaint.

The Court. It is so ordered. The amendment will be made to conform with the proof.

Mr. Milverton. At this time in order to save the point we object to any such amendment being made, claiming that it is too late, and except to the ruling of the court.

The Court. And the other objection made Mr. Milverton, I don't think that is well taken—that each separate article should be set out—therefore the objection will be overruled.

Mr. Milverton. Exception. (Stenographer's Notes, p. 92)

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

EXCEPTION No. XXXII.

Upon the hearing of said 15th proposed finding of fact just above referred to in the foregoing Exception No.
the following occurred:

Mr. McClanahan. Then we now move to amend the complaint in substituting $22,000 for $20,000 wherever the same appears in the complaint.

The Court. It is so ordered. The amendment will be made to conform with the proof.

33 Mr. Milverton. At this time in order to save the point we object to any such amendment being made, claiming that it is too late, and except to the ruling of the court.

The Court. And the other objection made, Mr. Milverton, I don't think that it is well taken—that each separate article should be set out—therefore the objection will be overruled.

Mr. Milverton. Exception. (Stenographer's Notes, p. 92)

To which ruling of the court allowing said amendment to the complaint, the defendant duly excepted, and said ruling is here and now assigned as error by said defendant.

EXCEPTION No. XXXIII.

Immediately thereafter plaintiff proposed the following finding:

The plaintiff has suffered damages from defendants' detention of the property in the sum of $1,045.00 being interest at six per cent. on said sum of $22,000 from June 1st, 1903, to the date of judgment herein; to which finding the defendant objected as follows:

Defendant objects to the 16th proposed finding of fact upon the ground that the evidence in said action does not show that the plaintiff suffered damages by reason of the defendant's alleged detention of said property in the sum of $1,045 or in any other sum.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

EXCEPTION No. XXXIV.

Immediately thereafter plaintiff proposed the following finding:

That each and every material allegation in plaintiff's
34 complaint, save as hereinabove qualified, has been es-
tablished by the evidence; to which finding the defendant objected as follows:

Defendant objects to the 17th proposed finding of fact upon the ground that the same is indefinite, ambiguous and unintelligible.

And the following proceedings were had:

Mr. McClanahan. We move to strike out "save as hereinabove qualified" and leave it that every material allegation has been proven.

Mr. Milverton. But we claim that that is not a proper finding of fact.

The Court. I think by striking out the words suggested there by Mr. McClanahan that then it will be quite clear. Of course I don't know that it helps any, but I am not sure that it hurts anything. The words "save as hereinabove qualified" are stricken out.

Mr. Milverton. Exception to your Honor's ruling, and except to each and every ruling upon the objections to the proposed findings of fact.

The court. Exceptions may be noted. (Stenographer's Notes, p. 92-93)

An exception having been duly taken to the ruling of said court, said ruling is here and now assigned as error by said defendant.

EXCEPTION No. XXXV.

Thereupon the following occurred in relation to defendant's objection to the plaintiff's proposed Conclusions of Law. Plaintiff proposed the following conclusion of law:

That the defendant is not in a position to be able to deny
or require proof of plaintiff's corporate existence;
35 to which conclusion defendant objected as follows:

Defendant objects to the first proposed conclusion of law upon the ground that the same is not based upon any finding of fact herein, nor upon any evidence in said action and is contrary to law, and upon the further ground that the same is vague, indefinite, ambiguous and unintelligible.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

EXCEPTION No. XXXVI.

Immediately thereafter plaintiff proposed the following conclusion of law:

That the contract of February 21st, 1900, was adjusted and settled between the parties by the contract of March 13th, 1901, to which conclusion the defendant objected as follows:

Defendant objects to the 2d proposed conclusion of law upon the ground that the same is vague, indefinite, ambiguous and unintelligible.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

EXCEPTION No. XXXVII.

Immediately thereafter plaintiff proposed the following conclusion of law:

That the contract of March 13th, 1901, between plaintiff and the Kona Sugar Company, Limited, was a conditional sale and not a chattel mortgage or absolute sale with lien reserved in the vendor, and under it plaintiff held title to the property sued for; to which conclusion the defendant objected as follows:

36 Defendant objects to the 3d proposed conclusion of law upon the ground that the same is not based upon any finding of fact, and is not supported by the evidence in said action, and upon the further ground that said conclusion is contrary to law.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

EXCEPTION No. XXXVIII.

Immediately thereafter plaintiff proposed the following conclusion of law:

That the payment of $10,000 under the contract of March 13th, 1901, and the giving of the note therein for $37,044.53 secured by the bonds of the Kona Sugar Company, Limited, was in settlement and adjustment of the contract of February 21st, 1900, and neither said cash or said note and bonds were given as a consideration for the purchase price of the materials sued for; to which conclusion the defendant objected as follows:

Defendant objects to the 4th proposed conclusion of law upon the ground that the same is not supported by any finding of fact herein, nor by the evidence in said action, and is contrary to law.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

EXCEPTION No. XXXIX.

Immediately thereafter plaintiff proposed the following conclusion of law:

37 That the condition precedent, the performance of which was to divest the plaintiff of title for the property sued for, was the payment of the note of $37,044.53 which had been given as one of the considerations for the settlement of the contract of February 21st, 1900; to which conclusion the defendant objected as follows:

Defendant objects to the 5th proposed conclusion of law upon the ground that the same is not supported by any finding of fact herein, nor by the evidence in said action, and upon the further ground that said conclusion is vague and indefinite and is contrary to law.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

EXCEPTION No. XL.

Immediately thereafter plaintiff proposed the following conclusion of law:

That the contract of March 13th, 1901, was an entire contract for a lump sum consideration and contained lienable and nonlienable items; to which conclusion the defendant objected as follows:

Defendant objects to the 6th proposed conclusion of law upon the ground that the same is not supported by the evidence in said action, and is contrary to law.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling of the court is here and now assigned as error by said defendant.

38

EXCEPTION No. XLI.

Immediately thereafter plaintiff proposed the following conclusion of law:

That the plaintiff has made no election of either remedies or rights so as to bar the bringing and maintaining of this action; to which conclusion the defendant objected as follows:

Defendant objects to the 7th proposed conclusions of law upon the ground that the same is not supported by any finding of fact herein, nor by the evidence in said action, and is contrary to law.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

EXCEPTION XLII.

Immediately thereafter plaintiff proposed the following conclusion of law:

That plaintiff is entitled to judgment against the defendant for the return of the property sued for and damages for its detention, and in the event of defendant's inability to return the said property, plaintiff is entitled to judgment for $22,000 its value, and also damages for its detention; to which conclusion defendant objected as follows:

Defendant objects to the 8th proposed conclusion of law upon the ground that the same is not supported by any finding of fact, nor by the evidence in said action, and upon the further ground that this court is without authority to render a money judgment herein, and upon the further ground that the defendant is entitled to have the judgment in said action show the separate value of each of the different articles 39 comprising the property ordered and adjudged by the decision of this court to be returned by this defendant to said plaintiff.

The court then and there overruled said objection to which ruling of the court defendant then and there duly excepted and said ruling is here and now assigned as error by said defendant.

EXCEPTION No. XLIII.

Thereupon the plaintiff presented to the court the following decision:

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT,
Territory of Hawaii.
December Term, 1903.

William W. Bierce, Limited, A Corporation,
Plaintiff,
vs.
Clinton J. Hutchins, Trustee,
Defendant.
Replevin.

Decision.

The court having heard the above entitled cause does hereby find for the plaintiff for the recovery of the following property:

362 tons of steel T rails weighing 35 pounds to the yard.
Joints for laying 550 tons of steel T rails.
Railroad track spikes to lay 550 tons of said rails.
10 set of 35 pound split switch material, complete.
16 railway cars 25 feet long, 7 feet wide for 3 ft. gauge track.
One 9 x 14 class "A" saddle tank locomotive.
One 10 x 16 back saddle tank locomotive.
One Howe Narrow Gauge track scale, capacity 25 tons.
One set re-railers.

Four track gaugers, 3 feet.
One rail bender.
One track drill.
One section car with seats.
Two Jacks.

40 Together with damages for its detention from the 1st day of June, 1903, to the date hereof, and in the event of the inability and failure of the defendant to forthwith make return of said property to the plaintiff, that the plaintiff shall have judgment for the value of said property found to be the sum of $22,000 and damages for its detention from the 1st day of June, 1903, found to be the sum of $1,045 and the costs of this action.

Dated, Honolulu, March A. D. 1904.

First Judge of the Circuit Court
of the First Judicial Circuit.

And the following proceedings were had and occurred:

Mr. McClanahan. I present now to the court the decision in this case, filed the other day, filed with the bill of costs. Counsel have had notice and copy of the decision.

Mr. Milverton. We object to the decision and the signing of the same upon the ground that it is not supported by the evidence in the case and as contrary to law, and upon the further ground that the court has no authority to order an alternative judgment in said case, and upon the further ground that the decision should set forth the separate value of the different articles claimed by the plaintiff in this action.

The Court. Objection overruled.

Mr. Milverton. Exception.

(Stenographer's Notes, 94)

To which ruling of the court the defendant then and there duly excepted, and said ruling of the court is here and now assigned as error by said defendant.

EXCEPTION No. XLIV.

And thereupon said plaintiff presented to said court the following judgment:

41 IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT,

Territory of Hawaii.

December 1903 Term.

William W. Bierce, Limited, A Corporation,
Plaintiff,
vs.
Clinton J. Hutchins, Trustee,
Defendant.
} Replevin.

Judgment.

This cause by stipulation of parties and consent of the above entitled court coming on regularly to be heard at the January 1904 Term of the Circuit Court of the First Judicial Circuit, before the Honorable John T. De Bolt, on the 7th day of March, A. D. 1904, and by stipulation of parties and consent of court a jury having been waived and the above named plaintiff being present represented by its attorneys Messrs. Kinney, McClanahan & Cooper, and the above named defendant being present represented by his attorneys John W. Cathcart, Esq., and Messrs. Castle & Withington, and said cause proceeding to trial on said last named day and continuing until Saturday the 12th day of March, 1904, and the court having heard the evidence adduced by the respective parties and being fully advised in that respect and argument having been made by the respective counsel, and the court being advised in all ways in the premises and having at the close of said argument rendered a decision in favor of the plaintiff and against the defendant for the return of the property sued for in said action together with damages
42 for its detention from the 1st day of June, 1903 to the date hereof, or in default to make return of said property that said plaintiff recover the value thereof shown to be the sum of $22,000 together with damages as aforesaid for its detention;

Now Therefore, it is ordered and adjudged that the above named defendant Clinton J. Hutchins, Trustee, forthwith return into the possession of William W. Bierce, Limited, or its authorized agent or attorneys the following described personal property, now in the possession of the said defendant:

362 tons of steel T rails weighing 35 pounds to the yard.

Joints for laying 350 tons of steel T rails.

Railroad track spikes to lay 550 tons of said rails.

10 set of 35 pound split switch material complete.

16 railway cars 25 ft. long, 7 ft. wide, for 3 ft. gauge track.

One 9 x 14 class "A" saddle tank locomotive.

One 10 x 16 back saddle tank locomotive.

One Howe Narrow Gauge track scale, capacity 25 tons.

One set re-railers.

Four track gaugers, 3 feet.

One rail bender.

One track drill.

One section car with seats.

Two Jacks.

and that said William W. Bierce, Limited, do have and recover from said Clinton J. Hutchins, Trustee, the sum of $ as damages for the detention of said property from the 1st day of June, 1903, to the date hereof, together with the costs of this action taxed at the sum of $

And it is further ordered and adjudged that on failure of the said defendant Clinton J. Hutchins, Trustee, to forthwith make such return of said property to the possession of said plaintiff, that the said plaintiff William W. Bierce, Limited, have and recover from the said defendant Clinton J. Hutchins, Trustee, the value of said property found and adjudged herewith to be the sum of $22,000 together with damages for its detention from the 1st day of June, 1903,
43 to the date hereof and adjudged to be the sum of $1,045.00
together with the costs of this action taxed at the sum of $

Witness the Honorable John T. De Bolt, First Judge of the Circuit Court of the First Judicial Circuit.

Dated, March 1904.

By the Court:

Clerk.

Whereupon the following occurred:

Mr. McClanahan. We have now if your Honor please, a judgment in this case.

Mr. Milverton. I object to the entering or rendering of a judgment on the ground that the same is contrary to the law and the evidence and the weight of the evidence, and upon the further ground that the court has no authority to render an alternative judgment or money judgment in an action of this character, and upon the further ground that the judgment should show the separate value of the different articles sued for and made the basis of this claim.

The Court. Well, the objection overruled.

Mr. Milverton. Exception. (Stenographer's Notes, p. 94-95)

To which ruling of the court an exception was duly taken by said defendant, and said ruling is here and now assigned as error by said defendant.

EXCEPTION No. XLV.

And the judgment having been thereupon signed and entered, the following occurred:

Mr. Milverton. After the signing of the judgment we again except to the judgment as contrary to law and the evidence and the weight of evidence.

44 Mr. Cathcart. And give notice of motion for a new trial.

(Stenographer's Notes, p. 95)

And said defendant here and now assigns as error the signing and entering of said judgment, as being contrary to law and the evidence and against the weight of the evidence.

EXCEPTION No. XLVI.

That thereafter and on the 23d day of March, A. D. 1904, defendant presented his motion for new trial in words and figures following to wit:

In the Circuit Court of the Third Judicial Circuit,
(Transferred to First Judicial Circuit)
Territory of Hawaii.

William W. Bierce, Limited,
Plaintiff,
vs. } Replevin.
Clinton J. Hutchins, Trustee,
Defendant.

Motion for New Trial.

Comes now Clinton J. Hutchins, Trustee, the defendant above named by its attorneys Cathcart & Milverton, and moves this Honorable Court that the decision and judgment in the above entitled action rendered and entered on the 12th day of March, A. D. 1904, and the 19th day of March, 1904, respectively in favor of the above entitled plaintiff and against said defendant, be set aside, and a new trial granted on the following grounds, to wit:

For that the said decision and judgment were and are contrary to the law and the evidence, and the weight of the
45 evidence, and for errors of law occurring during the
trial of said action, which errors were duly excepted to by said defendant and such exceptions allowed by the court.

This motion is based upon all the pleadings, papers, files and proceedings in said action, the decision of said court, the record and judgment appertaining to said action, the official stenographer's notes of the evidence and proceedings taken at the trial of the same, and the minutes of the Clerk of said court taken herein.

Clinton J. Hutchins,
Trustee,
By Cathcart & Milverton,
His attorneys.

Honolulu, T. H., March 19, 1904.

Which said motion was then and there denied and exception to the ruling of the court duly taken, and defendant here and now assigns said ruling of the court as error.

And to the end that justice and right may be done this defendant prays that this his Bill of Exceptions herein be settled, allowed and approved as true and correct in all particulars; and further prays that all records, papers, files, affidavits, exhibits, testimony, stenographer's notes, stenographer's transcript, and other papers and documents in said cause, be expressly made a part of this Bill of Exceptions and incorporated herein as fully and completely as if they and each of them were actually set out herein in words and figures.

Dated, Honolulu, April 15th, A. D. 1904.

Clinton J. Hutchins, Trustee,
Defendant.

Cathcart & Milverton,
Castle & Withington and
W. L. Whitney,
Attorneys for defendant.

46 ORDER APPROVING FOREGOING BILL OF EXCEPTIONS AND INCORPORATING THEREIN ALL FILES, RECORDS, EXHIBITS AND TESTIMONY.

In the matter of the foregoing Bill of Exceptions now duly presented in time by said defendant Clinton J. Hutchins, Trustee, it is hereby ordered by said court that said Bill of Exceptions, being found conformable to the truth, be and the same is hereby settled, allowed and approved as true and correct in all particulars;

And it is further ordered that all records, papers, files, affidavits, exhibits, testimony, stenographer's notes, stenographer's transcript, and other papers and documents in said cause, be and they are and each of them is hereby made a part of said Bill of Exceptions, and incorporated therein as fully and completely as if they and each of them were actually set out therein in words and figures.

Done and dated at Honolulu, this 10th day of June A. D. 1904, as of April 19, 1904.

(Signed) J. T. De Bolt,
Judge of said Court.

(Endorsed): Filed and presented to the Court for allowance this 16th day of Apr. 1904, at 9:40 A. M. P. D. Kellett, Jr. Clerk.

47 And on the same day, to-wit, the 10th day of June, A. D. 1904, as of the 19th day of April, A. D. 1904, there were also certified and sent up to the Supreme Court of the Territory of Hawaii, together with and as parts of the said Bill of Exceptions, all the records, papers, files, affidavits, exhibits, testimony, stenographer's notes, stenographer's transcript and other papers and documents in said cause which are mentioned in the Judge's certificate to said Bill of Exceptions, and thereby incorporated in and made parts of said Bill of Exceptions, and which now remaining on file and of record in the office of the Clerk of said Supreme Court are in the words and figures following, to-wit:

48 The plaintiff's complaint filed in said cause and the amendments thereof, the affidavit verifying said complaint, the exhibits thereto attached, the term summons issued in said cause and return of service thereon endorsed, the affidavit for replevin and the Deputy Sheriff's certificate of levy upon and release of property in said cause, all attached together and all returned and filed in the office of the Clerk

of said Circuit Court of the Third Judicial Circuit on the first day of August, A. D. 1903, which are in the words and figures following, to-wit:

49 IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT.

Territory of Hawaii.

December 1903 Term.

William W. Bierce Limited, a corpotion,
Plaintiff.
vs.
Clinton J. Hutchins, Trustee,
Defendant.
} ($2.00 Stamps)
Replevin.

Complaint.

Now comes William W. Bierce Limited, plaintiff herein, by its attorneys Kinney & McClanahan, and complains of Clinton J. Hutchins Trustee and for cause of action shows:

1.

That plaintiff is a corporation duly organized and existing, under the laws of the state of Louisiana and having its principal place of business in the city of Chicago in the State of Illinois.

2.

That the defendant is a resident of Honolulu, Island of Oahu, Territory of Hawaii, and a citizen of the said Territory of Hawaii.

3.

That on or about February 21st. A. D. 1900 the said plaintiff agreed to furnish to the Kona Sugar Co. Ltd., a corporation duly organized and existing under the laws of the
50 Territory of Hawaii, certain rails, engines, cars and
other goods and merchandise for use on the plantation of the said Kona Sugar Co. Ltd. in the District of Kona, Island and Territory of Hawaii, at prices specified in the said agreement, which prices the said Kona Sugar Co. Ltd. agreed

in writing to pay in cash upon the presentation of a demand draft attached to the bill of lading issued by the initial railroad, showing the said goods and merchandise to have been shipped through to the city of Honolulu, Island of Oahu, Territory of Hawaii.

4.

That in pursuance of the said agreement said plaintiff proceeded to ship the articles mentioned in said agreement to said Honolulu; that upon shipment of said goods and merchandise demand was made upon the said Kona Sugar Co. Ltd. for the payment of the price thereof in accordance with the terms of the agreement before mentioned. That the said Kona Sugar Co. Ltd., failed, neglected and refused to pay the said price or any part thereof; that because of this said failure on the part of the Kona Sugar Co. Ltd., the said goods and merchandise were not upon their arrival at said Honolulu nor at any other time, save as hereinafter mentioned, delivered to the said Kona Sugar Co. Ltd. nor was the title to said goods and merchandise or the right of property therein or the title or right of property of or in any part thereof ever transferred or taken from plaintiff, but that plaintiff retained both the title and possession and the right to the possession of the said goods and merchandise and each and all of them and every part thereof, and refused to permit them or any of them to pass into the possession of the said Kona Sugar Co. Ltd., except as hereinafter stated, nor
51 did they or any of them in fact pass into the possession of the Kona Sugar Co. Ltd., except as hereinafter stated.

5.

That thereafter, to wit on or about March 13th, 1901 a said agreement of February 21, 1900 was adjusted and settled by a supplementary contract in writing was entered into between the said William W. Bierce, Ltd., and the said Kona Sugar Co. Ltd., whereby the said William W. Bierce Ltd., offered in writing to permit the said Kona Sugar Co. Ltd., to take possession of the said rails, engines, cars and other goods and merchandise mentioned and to use the same upon the payment of $10,000.00 Gold Coin to the said William W. Bierce, Ltd., and the execution of a promissory note by the said Kona Sugar Co. Ltd., to the said William

Amendment allowed by the court this
7th day of Mch 1904

W. Bierce Ltd., for $37,044.53, payable six months from date, upon the express condition, understanding and agreement that the said goods and merchandise should not become the property of the said Kona Sugar Co. Ltd., until the payment of the said note; which said offer and each and all of the terms and conditions thereof were accepted in writing by the said Kona Sugar Co. Ltd., upon the 13th day of March, A. D. 1901 and a promissory note for $37,044.53 payable six months after date to the order of William W. Bierce Ltd. was duly executed and delivered by the said Kona Sugar Co. Ltd., to the said William W. Bierce Ltd. Copies of said contract and note, marked respectively Exhibit "A" and Exhibit "B" are hereto attached referred to and made a part hereof.

6.

Amendment allowed by the court this
7 day of March 1904
P. D. Kellett
Clerk

That thereafter, in accordance with the terms of said supplementary contract of March 13th, 1901, but not otherwise, the said William W. Bierce Ltd. permitted the said Kona Sugar Co. Ltd. to take possession of and the said Kona Sugar Co. Ltd. did in fact take possession of the following goods and merchandise, to-wit:

362 tons of steel T. rails weighing 35 lbs. to the yard.
Joints for laying 550 tons of Steel T. Rails.
Railroad track spikes to law 550 tons of said rails.
10 sets of 35 lb. split switch material, complete.
16 cars, 25 feet long, 7 feet wide for 3 ft. gauge track.
One 9 x 14 Class "A" saddle tank locomotive.
One 10 x 16 back saddle tank locomotive.
One Howe narrow gauge track scale, capacity 25 tons.
One set re-railers.
Four track gaugers, 3 feet.
One rail bender.
One track drill
One section car with seats.
Two Jacks

Which said rails, cars, engines and other goods and merchandise as above enumerated were then and continued to be the property of the said William W Bierce Ltd.; that the said Kona Sugar Co. Ltd., failed upon September 13th. 1901, said date being six months from the date of the execution of the promissory note mentioned to pay the said note or the sum therein mentioned or any part thereof, nor has it the said Kona Sugar Co. Ltd. at any time since said date nor at any

time, though thereto often requested by plaintiff, paid the
said note or the sum therein mentioned or any part there-
53 of nor has any third person for or on behalf of the said
Kona Sugar Co. Ltd. or otherwise paid the said note or
the sum therein mentioned or any part thereof.

7.

That from the date of said ~~supplementary~~ contract of March 13th, 1901 and up to the 1st. day of June A. D. 1903, the aforesaid property was at all times in the possession and control of the Kona Sugar Co. Ltd. or the receivers of the said Kona Sugar Co. Ltd. duly appointed.

Amendment allowed by the court this
7 day of Mch 1904

8.

That on or about the 1st. day of April, A. D. 1903, the Honorable W. S. Edings, Judge of the Circuit Court of the Third Circuit, sitting at Chambers in Equity, in that certain case of R. W. McChesney et al. vs. the Kona Sugar Co. Ltd. et al ordered F. L. Dortch, then Receiver of the Kona Sugar Co. Ltd. to sell all the property, both real and personal of the said Kona Sugar Co. Ltd.; that in pursuance of the said order the said F. L. Dortch proceeded to offer for sale and on the 9th. day of May A. D. 1903, did sell the property of the Kona Sugar Co. Ltd., aforesaid, but that the said F. L. Dortch did not and could not sell the rails, cars, engines and goods and merchandise hereinabove more particularly described for the reason that the same were then and now are the property of William W. Bierce Ltd, plaintiff herein.

9.

That at the said sale of the property of the Kona Sugar Co. Ltd. the defendant, C. J. Hutchins Trustee became the purchaser of the said property of the Kona Sugar Company
Ltd; That on June 1st. A. D. 1903 the Honorable W. S.
54 Edings, Judge of the Circuit Court of the Third Circuit
sitting at Chambers in Equity made an order confirming
the said sale; and that thereupon the defendant proceeded to and did take possession of all the property, real and personal, belonging to the Kona Sugar Co. Ltd.

10.

That the said defendant in addition to taking possession of the property of the Kona Sugar Co. Ltd. also took possession and control of the rails, engines, cars and other goods and merchandise hereinbefore more particularly described, belonging to plaintiff, and still retains possession and control of the same which said taking and retaining of the possession of the said rails, engines, cars and the other goods and merchandise hereinbefore more particularly described were unlawful and in contravention of the rights of plaintiff under the law.

11.

That the said rails, cars, engines and goods and merchandise hereinbefore more particularly described have been at all times mentioned in this complaint and now are the property of plaintiff and it has been and still is the true and lawful owner thereof and is entitled to the exclusive and immediate possession thereof.

12.

That the said William W. Bierce Ltd. has demanded of said defendant the return of all and singular the property aforesaid; but that said defendant has failed neglected and refused and still fails, neglects and refuses to return the said property or any portion thereof; that the said property was wrong-
55 fully taken and now is wrongfully detained by said defendant contrary to the rights of plaintiff therein; that the said property was taken by defendant and is now detained by defendant in the District of Kona, Island and Territory of Hawaii, and within the jurisdiction of this Honorable Court.

13.

That the said property has not been taken for a tax assessment or pursuant to a statute or seized under an execution or an attachment against the property of the plaintiff.

14.

That the actual value of the said property is
Twenty-two
FIFTEEN Thousand Dollars.
THOUSAND DOLLARS ($15,000.00).

Amendment allowed by the court by substituting $22,000. for $20,000 this 19th of Mch. 1904.

P. D. Kellett, Jr.,
Clerk.

Amendment allowed by the court this
7th March 1904

Wherefore Plaintiff prays:

1. That the process of this Court may issue summoning the said defendant to appear and answer this complaint before a jury of the country at the December 1903 Term of this Honorable Court, unless sooner disposed of by judicial authority.

2. That plaintiff may have judgment for the return of all and singular the said property together with damages of its taking and detention and the costs of this action.

William W. Bierce Limited?
By Kinney & McClanahan.
Its attorneys.
E. B. M.

Dated Honolulu July 20th 1903.

Honolulu, Oahu
Territory of Hawaii } ss.

56 E. B. McClanahan being first duly sworn on oath deposes and says:

That he is a member of the firm of Kinney & McClanahan, attorneys for William W. Bierce Ltd, above-named plaintiff: That William W. Bierce Ltd. is a foreign corporation doing business without the Territory of Hawaii, that Kinney & McClanahan are their representatives of William W. Bierce Ltd. in this jurisdiction, that he has read the foregoing complaint and knows the contents thereof and that the matters and things set forth therein are true to the best of his knowledge, information and belief.

(Signed) E. B. McClanahan

Subscribed and sworn to before me this 20th day of July A. D. 1903.

(Signed) GUSSIE H. CLARK
(Seal) *Notary Public First Judicial Circuit.*

57 EXHIBIT "A"

Honolulu, H. T., Mar. 13, 1901.

Kona Sugar Company Limited,
Honolulu, H. I.

Gentlemen:—

Amendment, allowed by the court this 7th day of March 1904
P. D. Kellett Jr
Clerk

In pursuance of the verbal agreement made between your President and William W. Bierce, Limited, we hereby offer the following terms in settlement of the contract between the Kona Sugar Company Limited and William. W. Bierce Limited as evidence by letter dated February 21, 1900, and accepted by the Kona Sugar Company Limited, Feb. 22, 1900.

We will take in settlement of this contract the sum of $10,000.00, U. S. Gold Coin, and the promissory note of the Kona Sugar Company Limited for the sum of $37,044.53, in favor of William W. Bierce, Ltd., payable six months after date at the Whitney National Bank in New Orleans, bearing interest at the rate of seven and one-half per cent (7-1/2%) per annum and secured by First Mortgage Bonds of the Kona Sugar Company Limited of par value equal to the note, said bonds being portion of a duly authorized issue not exceeding $200,000. This offer is conditioned upon its acceptance by you payment of the money and the delivery of the note, with collateral, before 4 P. M. on Thursday, March 14th, A. D. 1901.

Upon such payment being made to us, before the hour named, we will deliver to you the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting delivery, upon the express condition and understanding that said rails, locomotives, cars, 58 scales and other materials are and shall remain the property of William W. Bierce, Limited, until the full payment of the note above described, according to its terms.

Very truly yours,
W. W. BIERCE LTD.
By H. T. GILBERT.

The above terms are accepted this March 13, 1901.

THE KONA SUGAR CO. LTD.
By its President,
(Seal) J. M.
By its Treasurer F. W. McCHESNEY
F. W. McCHESNEY

Received on account of above agreement exchange on New York for Ten Thousand Dollars and Seventy-six (76) $500. Bonds of the Kona Sugar Co. Numbered from 1 to 76 both inclusive.

W. W. BIERCE LTD.
By H. T. GILBERT.

59 EXHIBIT "B"

Honolulu, H. I. March 13, 1901.

$37044.53

Six months after date we promise to pay to the order of Wm. W. Bierce Limited, at the Whitney National Bank of New Orleans, La., U. S. A. the sum of Thirty seven thousand and Forty-four Dollars and 53/100 ($37,044.53) with interest at the rate of seven and one-half per cent. per annum until paid both principal and interest payable in Gold Coin of the United States.

Secured by bonds of the Kona Sugar Co. of the nominal value of Thirty Eight Thousand Dollars $38000—(Seventy Six Bonds of the value of $500.00 each numbered from 1 to 76 both numbers inclusive.)

THE KONA SUGAR CO. LTD.
By its President
J. M. McCHESNEY
By its Treasurer;
F. W. McCHESNEY

(Indorsed) Pay to the order of Harry T. Gilbert
WM. W. BIERCE, LIMITED
by WM. W. BIERCE—
Pred't.

W. W. BONDEN
Secty & Treas

WM. W. BIERCE LTD.
W. W. BONDEN
Secty & Treas

HARRY T. GILBERT
WM. W. BIERCE LTD.
by C. BIERCE
V-Prest.

(Stamps)

60 (Endorsed) Circuit Court Third Circuit Territory of Hawaii Wm. W Bierce Ltd Plaintiff vs. Clinton J. Hutchins Trustee Defendant Replevin Recd 33.00 J. P. Curts Kinney & McClanahan Honolulu Attorneys for Plaintiff.

61 IN THE CIRCUIT COURT OF THE THIRD CIRCUIT,

Territory of Hawaii.

William W. Bierce Ltd a corporation
v.
Clinton J. Hutchins Trustee
} ($2.00 Stamps Term Summons

The Territory of Hawaii: To the High Sheriff of the Territory, or his Deputy; the Sheriff of the Island of Hawaii, or his Deputy:

You are commanded tc summon Clinton J. Hutchins Trustee Defendant in case he shall file written answer within twenty days after service hereof, to be and appear before the said Circuit Court at the December Term thereof to be holden at Kailua Island of Hawaii on Wednesday the 23rd day of December next, at 10 o'clock A. M., to show cause why the claim of William W. Bierce, Ltd a corporation Plaintiff should not be awarded to it pursuant to the tenor of its annexed Petition.

And you are commanded to And have you then there this Writ with full return of your proceedings thereon.

Witness Hon. W. S. Edings Judge of the Circuit Court of the Third Circuit, at Kailua, Hawaii this 20th day of July 1903

(Sig) HENRY SMITH
(Seal) *Clerk.*
Judiciary Department

62 Written on the back of said Term Summons are the following endorsements:

Term Summons issued at three o'clock P. M., July 20th, 1903.

HENRY SMITH,
Clerk Jud. Dept.

Returned at seven o'clock A. M., August 1, 1903.

J. P. CURTS,
Clerk.

Served the within summons as follows: On Clinton J. Hutchins, trustee at his office in the City of Honolulu, Oahu, Territory of Hawaii, on the 20th day of July, A. D. 1903, by delivering to him a certified copy hereof and of the complaint hereto annexed, and at the same time showing to him the original summons and complaint.

Dated, July 20, 1903.

CHAS. F. CHILLINGWORTH,
Deputy Sheriff.

63 IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT

Territory of Hawaii.

December 1903 Term.

William W. Bierce Ltd., a corporation,
Plaintiff.
vs.
Clinton J. Hutchins, Trustee,
Defendant.
} Replevin.

Affidavit.

Honolulu, Oahu,
Territory of Hawaii } ss.

E. B. McClanahan, being duly sworn on oath deposes and says: that he is a member of the firm of Kinney & McClanahan the attorneys of William W. Bierce Ltd., a Louisiana corporation plaintiff in the above entitled action: that he is familiar with the facts alleged herein and that he makes this affidavit on behalf of said corporation.

First. That the said William W. Bierce Ltd., is the owner of the following property, to-wit:

362 tons of steel T. Rails, weighing 35 lbs. to yd.
Joints for laying 550 tons of steel T. rails
64 Railroad track spikes to lay 550 tons of said rails
10 sets of 35 pounds split switch material, complete
16 cars 28 feet long 7 feet wide for 3 ft. gauge track
One 9 x 14 Class "A" saddle tank locomotive
One 10 x 16 Class "M" back saddle tank Locomotive
One Howe Narrow gauge track scale, capacity 25 tons
One set re-railers

Fours track gaugers, 3 ft.
One rail bender
One track drill
One section car with seats
Two Jacks

Second. That the said property is now unlawfully detained by the above-mentioned defendant.

Third. That the said property has not been taken for a tax, assessment or fine pursuant to a statute or seized under an execution or an attachment against the property of the plaintiff.

Fourth. That the actual value of the said property is Fifteen Thousand (15,000) Dollars.

(Signed) E. B. McClanahan.

Subscribed and sworn to before me this 20th day of July A. D. 1903.

(Signed) Gussie H. Clark
(Seal) *Notary Public First Judicial Circuit.*

65 In pursuance of the within affidavit and order, I did on the 22nd day of July A. D. 1903, attach and take into my custody all the following described property:

362 tons of steel rails, weighing 35 pounds to yd.
Joints for laying 550 tons of steel rails
Railroad track spikes to lay 550 tons of said rails
Ten sets of 35 pound split switch material, complete
16 cars 28 feet long 7 feet wide for 3 ft. Guage track
One 9 x 14 Class "A" saddle tank locomotive
One 10 by 16 Class "A" back bag saddle tank locomotive
One Howe narrow gauge track scale, capacity 25 tons
One set re-railers
Four track gaugers 3 ft.
One rail bender
One track Drill
One section car with seats
Two Jacks

the same being the property in said affidavit enumerated.

And did on the 22nd day of July A. D. 1903 release said property from such attachment upon the filing by defendant of a written undertaking for double the value of the property attached.

(Signed) J. K. Nahale
Deputy Sheriff of North Kona, Hawaii.

(Endorsed:) Filed Aug. 1, 1903, 7 o'clock P. M. J. P. Curts, Clerk.

66 The defendant's re-delivery bond, filed in the office of the Clerk of said Circuit Court of the Third Judicial Circuit on the first day of August, A. D. 1903, which said bond is in the words and figures following, to wit:

CIRCUIT COURT—THIRD CIRCUIT.

Territory of Hawaii.

William W. Bierce, Limited, a Corporation,
Plaintiff
v.
Clinton J. Hutchins, Trustee
} Replevin.

($1.00 stamp)

Return Bond.

Know All Men By These Presents:

That we Clinton J. Hutchins, Trustee, as principal and Henry Waterhouse and Arthur B. Wood as surities are held and firmly bond unto William Bierce Company, Limited, its successor or successors and assigns in the sum of Thirty Thousand (30,000) Dollars, for the payment of which well and truly to be made, we bind ourselves, our successors, herein and administrators jointly and severally firmly by these presents.

The condition of the foregoing obligation is as follows:

That whereas the said William W. Bierce, Limited has begun in the Circuit Court of the Third Circuit of the Territory of Hawaii, a replevin suit against Clinton J. Hutchins, Trustee, to recover from him certain property specifically set forth in the Bill of Complaint filed in said suit, and of the value of $15,000 as stated in the affidavit filed therein, and has requested that the said property be taken possession of by the High Sheriff of the Territory of Hawaii, or his
67 deputies and turned over to said plaintiff; and whereas said defendant is desirous of having said property returned and has required the return thereof from said High Sheriff and his deputies;

Now Therefore if the said property and all thereof shall be well and truly delivered to said plaintiff, if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause be recovered against the defendant, then this obligation to be null and void, otherwise to be and remain in full force and effect.

In Witness Whereof we have hereunto set our hands and seals this 21st day of July, A. D. 1903.

CLINTON J. HUTCHINS,
Trustee
HENRY WATERHOUSE
Surety
ARTHUR B. WOOD
Surety

The foregoing Bond is approved as to its sufficiency of sureties.

Dated July 21, 1903.

A. M. BROWN,
High Sheriff.

(Endorsed:) Filed, August 1st, 1903, 7 o'clock A. M. J. P. Curts Clerk.

68 The defendant's answer to the plaintiff's complaint, which said answer was filed in the office of the Clerk of said Circuit Court of the Third Judicial Circuit, on the 20th day of August, A. D. 1903, and is in words and figures following, to-wit:

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT,
Territory of Hawaii.

William W. Bierce, Limited A Corporation,
Plaintiff,
vs.
Clinton J. Hutchins, Trustee,
Defendant.
} Replevin.

Answer.

Now comes the defendant above named and for his answer to the complaint of plaintiff herein says:

1.

1. The defendant admits that he is a resident and citizen of the Territory of Hawaii, as in said complaint alleged.

2. Defendant admits that under and by virtue of an order

of the Honorable W. S. Edings, Judge of the Circuit Court, Third Circuit, Territory of Hawaii, sitting at Chambers in Equity, duly made and entered in that certain action before him pending, entitled, R. W. McChesney, et al, vs. Kona Sugar Company, Limited, et al, all of the property, real, personal and mixed, of the said Kona Sugar Company, Limited, was, on or about the 9th day of May, 1903, sold to this defendant free and clear of all incumbrances.

3. Defendant alleges that the personal property set forth and described in said complaint was on said 9th day of May, 1903, and long prior thereto, the property of said Kona Sugar Company, Limited, and was part of the assets and property so as aforesaid then and there sold to this 69 defendant; and defendant upon the confirmation of said sale on the first day of June, 1903, then became, ever since has been and now is the owner in lawful became ever since has been and now is the owner in lawful possession possession thereof. thereof

II.

And, except as hereinbefore admitted, qualified or alleged, defendant denies the truth of the facts stated in said complaint and in each and every allegation thereof; and denies the truth of each and every fact therein stated.

Wherefore defendant asks to be hence dismissed with costs of this action.

(Sig) CLINTON J. HUTCHINS Trustee.
Defendant/

Dated August 20th, A. D. 1903.

(Sig) JNO. W. CATHCART
Attorney for defendant.

(Endorsed): Filed Aug. 20, 1903, in Third Circuit Court. Henry Smith Clerk Jud. Dept.

70 The plaintiff's motion to amend complaint, which was filed in the office of the Clerk of said Circuit Court of the Third Judicial Circuit on the 4th day of March, A. D. 1904, and is in the words and figures following, to wit:

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT,

Territory of Hawaii

December 1903 Term.

William W. Bierce Limited a corporation,
Plaintiff.
vs.
Clinton J. Hutchins, Trustee,
Defendant.
} Replevin.

Motion to Amend.

Now comes the above named plaintiff, by its attorneys Kinney, McClanahan & Cooper, and moves to amend its complaint heretofore filed herein as follows:

In paragraph 5 on the third page of said complaint on the first and second line of said paragraph, strike out the words "a suplemental contract in writing was", and insert in lieu thereof the words, "said agreement of February 21, 1900, was adjusted and settled by a contract in writing."

In paragraph 6 on the fourth page of said complaint, on the second line of said paragraph striking out the word "supplementary" and adding after the word "contract" on said line, the words "of March 13th, 1901."

71 In paragraph 7 on the fifth page of said complaint on the first line of said paragraph, strike out the word "supplementary" and add after the word "contract" on said line the words "of March 13th, 1901."

In paragraph 14 on the seventh page of said complaint, strike out the words "Fifteen Thousand Dollars" and repeated numerals in brackets, and add in lieu thereof the words "Twenty Thousand Dollars".

This motion is based on the records, and the affidavit of E. B. McClanahan attached to and made a part hereof.

Dated, March 4th, 1904.

KINNEY, MCCLANAHAN & COOPER,
Attorneys for W. W. Bierce Ltd.

(Endorsed): Filed Mch. 4, 1904. P. D. Kellett, Jr., Clerk.

72 The stipulation filed in the Clerk's office of said Circuit Court and the order entered thereon by said Court on the 14th day of December, A. D. 1903, transferring said cause to the Circuit Court of the First Judicial Circuit of the Territory of Hawaii and directing all papers filed in said cause to be forwarded thereto, which said stipulation and order are in words and figures following, to wit:

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT,

Territory of Hawaii.

December 1903 Term.

William W. Bierce Limited, a corporation,
Plaintiff.
vs.
Clinton J. Hutchins, Trustee,
Defendant.
} Replevin.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above cause that the venue of the same be changed from the Third Circuit to the First Circuit, and that the trial take place before the Circuit Court of the First Circuit instead of before the Circuit Court of the Third Circuit, and the said parties further agree that the above cause shall not be brought up for trial until the last week of February 1904.

WILLIAM W. BIERCE LIMITED
By its Attorneys.
KINNEY, McCLANAHAN & COOPER,
CLINTON J. HUTCHINS, Trustee,
By its attorneys
JNO. W. CATHCART.

Dated Honolulu, December 14th, 1903.

I allow the foregoing and hereby transfer said cause to the Circuit Court of the First Circuit and direct the Clerk of this Court to forward all papers in said cause to the First Circuit as aforesaid.

(Signed) W. S. EDINGS.
Judge Circuit Ct. Third Circuit.

(Endorsed) Filed December 16, 1903. J. P. Curts Clerk.

73 The official court stenographer's complete transcript of the evidence taken and the proceedings had on the trial of said cause and on the hearing on the findings of fact and conclusions of law in said Circuit Court of the First Judicial Circuit aforesaid, which said transcript was filed in the office of the Clerk of said Circuit Court on the 16th day of April, 1904, and is in words and figures following, to wit:

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT,

Territory of Hawaii.

W. W. Bierce, Ltd.
vs.
Clinton J. Hutchins.

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J. L. HORNER,
Official Reporter.

74 In the Circuit Court of the First Judicial Circuit,

Territory of Hawaii.

W. W. Bierce, Ltd.,
vs.
C. J. Hutchins, Etc.,

Transcript.

Mar. 7, 1904.

(Pleadings read and opening statement made for plaintiff.)

Mr. McClanahan. We offer in evidence the articles of incorporation of the plaintiff, William W. Bierce, Ltd.

Mr. Cathcart. We object to the introduction of the articles of incorporation on the ground that they are incompetent, irrelevant and immaterial. They do not show, if the court please, that they have been filed in accordance with the requirements of the law of this state for any foreign corporation doing business. There is no showing, if the court please, that they are in compliance with the laws of the state of Louisiana regarding the incorporation of companies.

(Argument)

Mr. McClanahan. I offer to the court a stipulation:

"It is hereby stipulated and agreed", etc. (Reads)

In pursuance of that resolution we shall offer in evidence and do offer in evidence the deposition of Columbus
75 Bierce, which I shall proceed to read.

"Deposition of Columbus Bierce of the City of Chicago . . . . and hereby attach it to my answer as Exhibit "Z".

We offer in evidence Exhibit "Z", which reads as follows: (Reads)

(Continues reading deposition)

We introduce in evidence Exhibit "A", reading as follows: (Reads)

I would like to ask counsel to consent to omit reading specifications about the cars, etc.

The Court. Very well, that portion as to the specifications may be considered as read.

Mr. McClanahan. (Continues reading.)

We now offer in evidence Exhibit marked Exhibit "Y". (Received and marked Exhibit "C").

(Continues reading)

Mr. Cathcart. I move to strike out the conclusions of certain portions of the answer. (Referring to answer to 25th interrogatory) I will have to read a little in advance. "All efforts to collect anything on this note having failed and the collateral having apparently become worthless, William W. Bierce, Limited, about January 1st, 1903, instructed its attorneys, Messrs. Kinney, Ballou & McClanahan, to proceed by all lawful means to recover back for William W. Bierce Limited the possession of the goods in question, conditionally delivered to the Kona Sugar Company Limited as the property of William W. Bierce Limited." I move to strike out the words "conditionally delivered to the Kona Sugar Co. Ltd. as the property of William W. Bierce, Limited." His answer here shows a conclusion of law.

76 I further move to strike out all that part with reference to what he instructed—what William W. Bierce, Ltd., about January 1st, 1903, instructed its attorneys to do, on the ground, if the court please, that it is not the best evidence of what he says there. It is in writing and should be put in evidence—read in evidence.

The Court. I think he is testifying to a fact there. Motion to strike will be denied.

Ex. Mr. Cathcart. Exception.

Mr. McClanahan. (Continues reading.)

Mr. Cathcart. I would like to make the same motion in regard to the answer to interrogatory 26, asking that all this part of the answer be stricken out on the ground it is a conclusion of law: "holding it as the property of William W. Bierce, Ltd. until fully paid for".

The Court. I think it is the same. The motion to strike will be denied.

Ex. Mr. Cathcart. Exception.

Mr. McClanahan. We now offer in evidence, if the Court please, first the contract, identified by the witness, of March 13th, 1901, conditional contract of sale—

The Court. This is the contract that was made by his agent?

Mr. McClanahan. Gilbert, yes; and second the note which is identified as the note being given under the contract.

Mr. Cathcart. It seems to me - - - they are hardly in a condition for admission. There is acceptance and there are other matters by the Kona Sugar Co. of which there has been no proof of any kind,—as to their signatures or what they did or anything. I suppose you will follow it up?

77 Mr. McClanahan. We will prove by Mr. Gilbert that the signature is the signature of the Kona Sugar Co.

Mr. Cathcart. I merely wish to reserve any rights.

The Court. The offer is as to the contents of the paper, aside from any endorsements?

Mr. McClanahan. Yes. I shall read the whole paper, with the offer to prove the signature of the Kona Sugar Co.

The Court. Well, you will show the materiality later then.

(Received, read and marked respectively Plaintiff's Exhibits "D" and "E")

Mr. McClanahan. (Continues reading until he comes to the 40th interrogatory.)

Mr. Cathcart. I desire to object to that.

Mr. McClanahan. Object to what,—the question?

Mr. Cathcart. Yes. I have no objection to the court reading the answer, if the court wishes to, I merely would like to put in my objection now, as incompetent, irrelevant and immaterial, then the answer and then I can move to strike it out. The question is "State what information or belief, if any, William W. Bierce, Ltd. had at the time they were notified that a lien had been filed in regard to the rights of the Kona Sugar Company Limited, in and to the land over which the plantation railroad ran."

Mr. McClanahan. I want to show that the Kona Sugar Co. had no title to the land and therefore our remedy was ineffective and abortive and we are not estopped by virtue of bringing that. (Referring to mechanic's lien.)

78 Afternoon Session,,
Mar. 7, 1904.

Mr. McClanahan. If I may be allowed, I would say that we are going to be charged in this case, I suppose, with an election of remedies. Now if that be so it will become very important for this court to know the state of information resting within our knowledge when we did so elect, as it is going to be charged.

(Argument)

The Court. That question and the answer will not be really considered evidence. It will not be considered by the court at this time, but if it appears later that it is proper to consider it I will do so. As it now appears to me it seems to me to be immaterial. The title to the land has nothing to do with this case. If the materiality does not later appear, why then of course it is—your objection will be sustained,—or I can sustain the objection now, with the understanding that the objection—

Mr. Cathcart. I would like to have the court do that, because if it is read now—

The Court. Well then, the objection will be sustained, however giving plaintiff an opportunity to offer it later if the materiality of it appears.

Mr. McClanahan. I will make this offer then: It appears to the court to be immaterial. Now I ask that it be allowed to go in and will prove it to be material.

The Court. I was expecting you would make that offer all along. Well then, it may be read with the offer of counsel to show the materiality. If it does not appear then
79 I will entertain a motion to strike it out.

(Answer read.)

Mr. Cathcart. I move to—I suppose I have got to move to strike out now a part of this. Take all that part of the answer which says "And under all the circumstances it was a reasonable and necessary inference on our part",—from that to the end of the answer, if the court please. I move to strike it out on the ground that it is incompetent, irrelevant and immaterial and a conclusion.

The Court. I think the whole answer simply amounts to this: that the plaintiffs had good reason to believe and did believe—that is what it amounts to.

Mr. McClanahan. If the evidence is going to be material it is going to be to show the condition of the mind of the plaintiff in making this election.

The Court. I think upon that ground the motion to strike will be denied.

Ex. Mr. Cathcart. Exception.

Mr. McClanahan. (Continues reading. Reads 41st Interrogatory)

Mr. Cathcart. If the court please, I make the same objection to this,—incompetent, irrelevant and immaterial.

Mr. McClanahan. We make the same offer.

The Court. Seems to be the same.

Ex. Mr. Cathcart. Exception.

(Mr. McClanahan reads 42nd Interrogatory)

Mr. Cathcart. I object to that as incompetent, irrelevant and immaterial.

Mr. McClanahan. I was going to make this offer: We

will prove that this state of affairs and this knowledge and
information on the part of W. W. Bierce at this time
80 was also had at the time of the discontinuance of the mechanic's lien suit. We will make that offer to prove
that.

The Court. I think it has some bearing. The objection overruled.

Ex. Mr. Cathcart. Exception. I suppose it is accepted subject to the same offer to make it material?

Mr. McClanahan. Yes, and further that we are going to make this showing.

(Continues reading, through answer to 42nd Interrogatory.)

Mr. Cathcart. Now I move to strike out the portions of the answer which I will read: Strke out all that portion of the answer commencing: "at about the same time we were advised to the same effect by letters received in the usual course of mail in our office from our counsel—Honolulu counsel, Messrs. Kinney, Ballou & McClanahan", on the ground it is not the best evidence. The letters themselves speak for what the Honolulu office advised; and strike out—strike it all out, on the ground that it is argumentative and that it appears that it is hearsay, and showing no facts whatever as to the title—as to the title of any—as far as any positive information they had received at this time as to the title.

Mr. McClanahan. We admit that it is hearsay, but it does not come within the rule of hearsay. It is not offered for the purpose of establishing a fact, it is offered for the purpose of showing the information which we had.

The Court. It shows a basis upon which the action--?

Mr. McClanahan. Exactly.

The Court. Well, the motion will be denied.

Ex. Mr. Cathcart. Exception.

81 Mr. McClanahan. (Continues reading.)

Mr. Cathcart. Same objection to the next answer.

Mr. McClanahan. Same offer.

The Court. Same ruling.

(Deposition read to the end.)

Mr. McClanahan. We now offer in evidence the deposition of Harry T. Gilbert. (Reads)

We offer in evidence letter dated July 18th, 1903, addressed to C. J. Hutchins, Trustee, signed "Kinney, & McClanahan, attorneys for William W. Bierce, Ltd., produced by the defendant. (Reads)

(Received and marked Plaintiff's Exhibit "F")

Mr. McClanahan. I ask defendant to admit that it was not answered.

Mr. Cathcart. I don't think it was—that is, not to my knowledge it was.

Mr. McClanahan. I call upon the defendant to produce the original demand notice and claim which was served on the defendant's agent at the sale of this property at Kona under the Court's order.

Mr. Cathcart. I haven't it with me. I will be very glad to procure it for counsel. I haven't it in my possession. I never have seen it.

Mr. McClanahan. I will state that the defendant was subpoenaed duces tecum to bring that demand with him. I will ask Mr. R. W. Shingle to take the stand.

82 Direct Examination of R. W. SHINGLE. Called and sworn.

Mr. McClanahan.

Q. What is your name? A. R. W. Shingle.

Q. What is your business, Mr. Shingle? A. I am a shareholder and officer in the Henry Waterhouse Trust Co.

Q. Do you know the defendant Clinton J. Hutchins? A. Yes sir.

Q. Did you have any connection with the defendant in March—in May, 1903? A. Yes sir.

Q. What was your connection with C. J. Hutchins in May, 1903? A. I was an agent, sent by him to Kailua, Kona, and authorized to bid on the assets of the Kona Sugar Co. sold by order of the Third Judicial District--Third Judicial Court.

Q. Receiver's sale? A. Receiver's sale, yes sir.

Q. Who was the receiver at that time? A. F. L. Dortch.

Q. Did you attend the sale? A. Yes sir.

Q. Did you bid on the property? A. Yes sir.

Q. Who for? A. C. J. Hutchins, Trustee.

83 Q. At that sale did you see present Alexander Lindsay, Jr.? A. Yes sir.

Q. The police magistrate? A. Yes sir.

Q. What did Mr. Lindsay have to do with the sale? A. Mr. Lindsay, as I understood it, acting on behalf of your firm, I think it was Kinney, McClanahan & Bigelow at that time—

Q. Yes? A. Read a protest.

Q. Protest? Whose protest? A. A protest signed by your firm and in the interest of W. W. Bierce & Co.

Q. Did you have anything to do with that protest subsequent to the sale? A. Other than—

Mr. Cathcart. I object to that, incompetent, immaterial and irrelevant, anything that happened after the sale. I suppose it means to bring home notice.

The Court. This question is not asked with a view of notice?

Mr. McClanahan. No.

The Court. Objection overruled.

A. Well, it was handed to me by Mr. Lindsay.

Q. After the sale? A. I think before the sale.

Q. Before the sale? A. He read it and served me with a copy of it.

Q. Have you got that notice? A. I think I gave it to Mr. Cathcart. If I did not must either Mr. Hutchins or Mr. Cathcart or myself have got it, I don't know.

84 Q. You were subpoenaed duces tecum to produce it, Mr. Shingle; have you made search for it? A. My subpoena was what you say?

Q? You were subjoenaed to bring that here. A. Well, I was subpoenaed to appear here, that is all I know about it.

The Court. You don't know of any duces tecum about it?

A. No, I don't know anything about that.

Mr. McClanahan.

Q. Well, will you please make search, Mr. Shingle, for that notice and demand? A. Yes sir.

Q. And produce it again? A. Yes sir.

Mr. McClanahan. I will ask the court to require Mr. Shingle to make search.

The Court. Make search among your papers.

A. Yes, I can tell in a few minutes whether I have it or not.

Mr. McClanahan.

Q. What did you bid in the property for? A. $12,250.00.

No cross examination.

Mr. McClanahan. In pursuance of a stipulation if the court please, the evidence of Alexander Lindsay, Jr. was taken which I will proceed to read, first offering in evidence the evidence of Alexander Lindsay, taken under a stipulation. (Reads until the following question: "And did you read it immediately following the sale?

85 A. Immediately following the sale.

Mr. Cathcart. I object to that as incompetent, irrelevant and immaterial as to what he did after the sale.")

Mr. Cathcart. I insist on that objection.

Mr. McClanahan. It is part of the res gestae.

The Court. Objection overruled.

Ex. Mr. Cathcart. Exception.

Mr. McClanahan. (Continues reading)

We now offer in evidence this copy, identified by the witness, of the notice read before the sale and after the sale. It is offered on the ground that we called upon the defendant to produce the original and it has not been forthcoming. We offer it in evidence.

(Received, read and marked Plaintiff's Exhibit "G")

(Deposition read to the end)

Direct Examination of J. M. McCHESNEY. Called and sworn.

Mr. McClanahan.

Q. You are the President of the Kona Sugar Co. are you, Mr. McChesney? A. Yes sir.

Q. You were subpoenaed duces tecum to bring with you the minutes of the stockholders and the minutes of the board of Directors of the Kona Sugar Co. Ltd. Have you those minutes? A. I have no minutes or have had none of

86 the company, not being secretary.

Q. Who has—have the minutes of the stockholders and Board of Directors? A. C. J. Hutchins was secretary at the time we turned the property over and should have them.

Q. At the time you turned these minutes over he was secretary? A. He always had the minutes. I never had the minutes, the possession of them.

Q. You mean the C. J. Hutchins, the defendant in this action? A. Yes, he was secretary of the company.

Q. You have not these minutes? A. No sir.

Q. And these minutes were turned over to him? A. Well, he succeeded E. O. White as secretary and received the minutes from White, Minute books.

Q. That is all you know about them? A. Yes.

No cross examination.

Mr. McClanahan. I call upon the defendant to produce the minutes.

We now tender, for the benefit of whom it may concern, bonds numbered one to 76—

The Court. These are the bonds—

Mr. McClanahan. Of the Kona Sugar Co. Ltd., each in the sum of $500, held by us heretofore as collateral security.

We also tender, for whom it may concern, the note of the Kona Sugar Co. Ltd. in the sum of $37,044.53.

Mr. Cathcart. We object on the ground that it is 87 incompetent, irrelevant and immaterial. I suppose the purposes of this tender are that the plaintiff is treating this contract as an executory sale and they are claiming that they have rescinded it, are making the tender so as to restore the Kona Sugar Co. to the status in quo. The tender should have been made at the time of the rescission of the sale—rescission of the executory agreement to sell, whenever that was; and further it is incompetent, irrelevant and immaterial because the full tender of the consideration passed on this executory agreement to sell has not been tendered into court. There is $10,000 that they admitted to have received.

(Argument)

The Court. Objection overruled.

Ex. Mr. Cathcart. Exception.

The Court. Of course the court is not holding this is a proper tender. It is a tender whatever purposes it may serve.

Mr. Cathcart. Exception.

Direct Examination of GEORGE LUCAS. Called and sworn.

Mr. McClanahan.

Q. What is your business, Mr. Lucas? A. Clerk of the First Circuit Court.

Q. Have you now with you and in your custody papers in the case of M. W. McChesney, et al. vs. the Kona Sugar Co. A. I have.

88 Q. Please produce them.

Mr. McClanahan. We introduce in evidence the papers in the case of M. W. McChesney & Sons vs. the Kona Sugar Co. Ltd. et al. We admit in this offer that there is a good deal in here that is not material to this case, but it is hard to segregate and take them out.

The Court. You should point out and designate what is material.

Mr. McClanahan. We offer in evidence then, and I will have to go through them this way or else get them confused, the clerk's minutes of February 5th, 1903 in the suit of M. W. McChesney & Sons et al. vs. The Kona Sugar Co. Ltd., et al;

The appeal bond of W. W. Bierce, Ltd. in the same matter;

The appeal of William W. Bierce, Ltd. in the same matter. I will state to the court that these are our appeals from the order of the court ordering this sale.

Also the order confirming the sale;

Also the order denying the motion of William W. Bierce, Ltd., dated June 1st, 1903;

Also the motion of William W. Bierce, Ltd. to which the affidavit of H. A. Bigelow is attached, sworn to May 29th, 1903, as wel as the affidavit of William Kamaka, dated the same date, sworn to the same day.

Also the answer of the Kona Sugar Co. Ltd. dated May 6th, 1903;

Also the stipulation in the same matter, dated April 8th, 1903;

Also the order of the Court in the same matter dated April 10th, 1903;

89 Also the stipulation in the same matter, signed "John W. Cathcart, attorney for McChesney & Sons, plaintiffs, John D. Paris, Hannah Paris, Eliza Roy, W. H. Shipman, J. D. Johnson and W. H. Johnson by Smith & Lewis, their attorneys; Kapiolani Estate, Ltd., by C. W. Ashford, its attorney; First American Savings and Trust Co. of Hawaii, Ltd., by its President Cecil Brown; L. M. Whitehouse by his attorneys Kinney, McClanahan & Bigelow; James A. Hopper, Co. Ltd., by its attorneys Kinney, McClanahan and Bigelow" and bearing the approval of the Court, dated March 30th, 1903;

Also the motion of William W. Bierce, Ltd. with the affidavit of H. A. Bigelow attached, sworn to the 7th of March, 1903, and also attached to the affidavit of S. H. Derby sworn to the same day;

Also the order of court in the same cause dated March 30th, 1903;

Also the motion of William W. Bierce, Ltd., service of copy of which being acknowledged March 26th, 1903;

Also the notice dated February 12th, 1903;

Also the motion dated February 12th, 1903, showing the granting of the motion on February 26th, 1903;

Also the motion dated February 3rd, 1903;

Also the order of the court of February 5th, 1903, denying the petitioner W. W. Bierce, Ltd. to bring a statutory action of replevin against the receiver;

Also the petition in intervention of William W. Bierce, Ltd., the petition in intervention dated February 12th, 1903;

Also the order and decree of the court of the Third Circuit in the same matter, filed April 20th, 1903, and also
90 the order confirming—That was for the sale of the property;

And also the order confirming the sale filed June 1st, 1903.

The Court. What is the purpose of offering these papers?

Mr. McClanahan. To show what this plaintiff has done in the way of attempting to regain this property from the Kona Sugar Co. while in the hands of a receiver to show notice of record—by record to the purchaser of this property C. J. Hutchins, Trustee. Mr. Hutchins is shown to be an officer of that company.

The Court. They may be received in evidence.

Mr. McClanahan. I have sent for a Writ of Error. I didn't know that the writ of error wesn't here.

Direct Examination of F. L. DORTCH, Called and sworn. Mr. McClanahan

Q. What was your connection with the Kona Sugar Co. on May 9th, 1903, Mr. Dortch? A. I was the receiver.

Q. By order of what Court? A. Judge Edings, Third Circuit.

Q. Where were you at that date? A. I was in Kailua.

Q. Were you present at the sale of the Kona Sugar Co's. Property? A. Yes.

91 Q. What was the financial condition of the Kona Sugar Co. at this time?

Mr. Cathcart. I object to it as incompetent, irrelevant and immaterial.

The Court. Where is it material?

Mr. McClanahan. This is one of the things that we will make material. We consider it is material to show these bonds and this note are absolutely worthless and that is what this witness is for.

(Argument)

We offer then to prove the insolvency of the Kona Sugar Co. at this sale and prior thereto and the worthlessness of its note at that time and prior thereto of $37,044.53 which we have tendered in court and these bonds which we have also tendered in court.

The Court. Objection sustained.

Mr. McClanahan. Save an exception.

We offer in evidence the petition for a writ of error in the case of William W. Bierce, Ltd., a corporation, plaintiff in error, versus M. W. McChesney, J. M. McChesney, surviving co-partner in the copartnership of M. W. McChesney, J. F. McChesney, et al. We sued out a writ of error from the order confirming the sale; took out a writ of error from the order of sale and we appeal from the order confirming the sale. This is introduced on the same theory that the other has been introduced.

Mr. Cathcart. I object to it as incompetent, irrelevant and immaterial.

The Court. Objection overruled.

Ex. Mr. Cathcart. Exception.

Mr. McClanahan. I will call Henry Smith. Mr. Smith
92 is being called on the renewal of our offer of the articles of incorporation.

Direct Examination of HENRY SMITH, Called and sworn.

Mr. McClanahan. I suppose it is admitted that Mr. Smith is Clerk of the Judiciary Department?

Mr. Cathcart. Yes.

The Witness. The question is, "I hand you a book and ask you whose property it is?" It belongs to the Supreme Court, Judge.

"In whose possession has it at this time been taken from? It was in my possession as Librarian of the Supreme Court.

"Who was it received from when it came into the custody and possession of the court?" It came in my possession.

"Who from?" The Secretary of State of Louisiana.

Mr. McClanahan. That is all. I offer—

The Witness. I will qualify. It so happens that this state we are treating only with the Secretary of State. There are other states I treat with the Secretary of State or a clerk of Court, or a State Librarian, but in this case, Louisiana, is the Secretary of State, is the only officer who sends to me and I send to him in exchange, so—

Mr. McClanahan. I offer in evidence Act 36 of the regular session of the general—of the acts and resolutions
93 passed by the General Assembly of the State of Louisiana, begun and held at the City of Baton Rouge on the 14th day of May, A. D. 1888 and which adjourned on Thursday the 12th day of July, A. D. 1888 and identified by the witness being the Act under which this corporation received its charter.

Mr. Cathcart.

Q. When did you receive this book? A. It is stated on the leaflet October the 19th, 1901. I received five or six other books besides this at the time.

Mr. McClanahan. That's all. I have offered it.

Mr. Cathcart. I object on the ground that it is incompetent, irrelevant and immaterial; that it is not proof of anything—of any law under which this company is incorporated so far as I can see, to show what the law is relative to the incorporation of companies in the State of Louisiana, of corporations in the state of Louisiana.

Mr. McClanahan. It is offered to show the law under which this company was incorporated. It certainly shows a de facto corporation. Whether the law was complied with or not it shows a de facto corporation.

(Argument)

The Court. This is in evidence anyway, the law. The Court will receive it as far as it goes.

Ex. Mr. Cathcart. Exception.

The Court. Of course I don't yet say that it establishes the fact of corporation.

94 Direct Examination of W. W. BIERCE, Called and sworn.

Mr. McClanahan.

Q. Do you know C. J. Hutchins, the defendant in this action? A. Yes sir, I do.

Q. I will ask you, Mr. Bierce, what your connection is with William W. Bierce, Ltd.? A. I am President and have been President since the company was organized in December, 1899.

Q. What is the company, William W. Bierce, Ltd.? A. We are dealers in plantation, railway supplies and other things that pertain to the iron and steel business, principally railroad equipment.

Q. Is it a partnership? A. No sir, it is a corporation.

Q. Under what law is it incorporated?

Mr. Cathcart. I object and move to strike out that answer as not being the best evidence of the incorporation.

The Court. This answer may be stricken out for the time being.

Mr. McClanahan.

Q. I will hand you this paper document, Mr. Bierce, and ask you what that is?

Mr. Cathcart. I object to that. The paper itself will answer what it is.

The Court. Objection overruled.

Mr. Cathcart. Exception.

95 The Court

Q. What is it Mr. Bierce? A. My brother and I were partners and we wanted to be—

Mr. Cathcart. I object. Let him answer the question.

The Court. What is this document; that is the question.

A. This I know to be a true copy of our articles of incorporation as prepared by our attorney.

Mr. Cathcart. I object and move to strike it out. There is the very question that he is testifying to, of the truthfulness of his articles of incorporation.

The Court? I think the objection will be sustained up to this point. Of course subject to other proof which you may offer. You may have something to establish user between the defendant and the plaintiff, something to show that he has recognized the existence of this corporation, and then the door is open.

Mr. McClanahan. Save an exception.

We make the offer now to prove by this witness that this paper here is a copy, a true copy of the articles under which this corporation has acted as a corporation. We make an offer to prove that and then are going to offer to introduce it in evidence as showing the corporation.

The Court. It will not be accepted at this time.

Mr. McClanahan. Save an exception.

Q. You say you have known Mr. C. J. Hutchins, do you? A. Yes sir.

Q. The defendant in this action? A. Yes sir.

Q. Where did you first meet Mr. Hutchins? A. Met him in San Francisco.

Q. Will you please state to the court the circumctances
96 under which you met Mr. Hutchins?

A. As President of the William W. Bierce, Ltd., I was coming out here to attend the trial of this case. Went in to call on some friends of mine Williams, Dimond & Co., and they told me Mr. Hutchins was in San Francisco; said they thought that they could locate him for me and I think they did locate him at Pacific Insurance Co., I think it is a life insurance Company. I went around to see Mr. Hutchins whom I had never met until that time and I says ‘‘My name is William W. Bierce. I presume you are familiar with that name.’’’’ He said he was. He then told me that he was trying to rehabilitate this plantation. I told him I was glad to learn it and he asked if I would stay in San Francisco for some papers arriving on the Ventura, I think he said, that he would give me a certain sum of money—

Mr. Cathcart. Well now, I object. Here is testimony going to show that long after the institution of this suit Mr. Bierce, the witness, met Mr. Hutchins in San Francisco and there was a conversation relative to a compromise of the action. Now I submit that it is inadmissible first on the ground that any dealings with—between the defendant and the plaintiff corporation so as to estop the defendant from—

Mr. McClanahan. We have been forced, if the court please, by the attitude of the defendant here to prove dealings between ourselves and this defendant in which he recognized that we were a corporation. Now this is a dealing between,—and it is offered for that purpose and no other—not to show an offer of compromise; it is offered to show that Mr. Hutchins did recognize this company as a corporation by

97 offering to deal with its President in the matter of this suit.

(Argument)

Here the court takes a recess until tomorrow morning at ten o'clock.

98 IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT,

Territory of Hawaii.

W. W. Bierce, Ltd.,
vs.
C. J. Hutchins, Etc.

Mar. 8, 1904.

Direct Examination of W. W. BIERCE, Recalled.

Mr. McClanahan

Q. Mr. Bierce, leaving out any negotiations—

Mr. Cathcart. We are pending a motion, I think, to strike out.

Mr. McClanahan. I consent that the answer be stricken out.

The Court. The last answer may be stricken out.

Mr. McClanahan.

Q. Leaving out any pending—any negotiations of compromise what dealings generally did you have with Mr. Hutchins at this time? A. I met Mr. Hutchins in San Francisco and he knew from—that I was President of William W. Bierce, Ltd.

Mr. Cathcart. I object to that as being a conclusion

99 of the witness and move that it be stricken out.

The Court

Q. How do you know that he knew it? A. I presented my card to him, Judge, and told him I was President of William W. Bierce, Ltd.

Mr. Cathcart. I move to strike out that part where he says Mr. Hutchins knew.

The Court. That may be stricken out and his last answer will take the place of it.

The Witness. And he dealt with me on three different occasions as the President of this corporation, which I had been President of since it corporate time.

Mr. Cathcart. I object to that and move it be stricken out. I would like to have the facts, not the conclusions of the witness.

The Court. Objection sustained.

Mr. McClanahan. Save an exception.

The Court. The motion is granted to strike out.

Mr. McClanahan. Will the court reconsider its ruling to strike out the evidence of the witness that he had dealings with the man? Why what is the foundation then for stating what these dealings consisted of?

The Court. If you are going to follow it up by details that is a different proposition.

Mr. McClanahan. I will go as far as I dare.

Mr. Cathcart. I take an exception to the court reconsidering it now and allowing it in.

The Court. I will permit you to ask such questions as you see fit, Mr. McClanahan, with such proposal or offer.

Ex. Mr Cathcart. Save an exception.

100 Mr. McClanahan.

Q. What was the subject-matter of these dealings? A. The subject-matter of these dealings was looking towards a settlement.

Mr. Cathcart

Q. Settlement of what? A. Well, Mr. Hutchins asked me if I would remain—

Mr. McClanahan. Just wait a moment please. I am not asking for conversation; I want to know the subject-matter, the res, the thing that you dealt on; what was the subject-matter of the conversation or the dealings?

A. Why, it was the things in question.

Q. The things in question? What things? A. The claim. We claimed the rails and locomotives and cane cars.

Q. You mean the property in question in this suit? A. Yes sir.

Q. That was the subject-matter of your dealings? A. The subject matter of our dealings.

Mr. Cathcart. I ask that the answer of the witness should be stricken out. (In regard to the dealings) The word "dealings" there is a conclusion of the witness which the court is to draw from the facts in the case as shown to the court. Therefore that part of it should be stricken out in which he contends that on three separate occasions the defendant Hutchins had dealings with the corporation through him.

The Court. The motion to strike out will be denied.

Ex. Mr. Cathcart. Exception.

101 Mr. McClanahan

Q. Mr. Bierce, prior to the bringing of this action on July 20th, 1903, what can you say with reference to dealing with this defendant in the matter of the material sued for in this suit. A. We had dealings with him from the time he bought the property up to the very time that this suit was brought.

Q. What was the nature in detail, of those dealings? A. Nature and detail was looking towards a settlement of the material in question that we furnished the Kona Sugar Co.

Q. What form did the negotiations take? A. They took the form of compromise, and they wanted us to accept, or asked if we would accept, a certain sum of money, which we declined to do.

Q. Was there a counter proposition made? A. Yes sir.

Q. What was the counter proposition in detail? Don't be afraid now, Mr. Bierce. A. The counter proposition in detail was that we would accept $20,000 cash.

Q. From Whom? A. From Clinton J. Hutchins.

Q. For what? A. For the 362 tons of rails and locomotives and cane cars, and rails, splice bars and spikes and other material that we furnished the Kona Sugar Co.

Q. The material sued for in this suit? A. Material sued for in this suit, yes sir, and while I may be permitted I would say that those negotiations that I had with Mr. Hutchins in San Francisco were continued up until almost the trial of this suit.

102 Mr. Cathcart

Q. Negotiations for compromise? A. Yes sir.

Mr. McClanahan.

Q. Has W. W. Bierce Ltd. acted or not as a corporation?

Mr. Cathcart. I object to it as incompetent, irrelevant and immaterial, not the best evidence to show any incorporation.

The Court. "Acted," you are speaking generally?

Mr. McClanahan. Yes sir.

The Court. Objection overruled.

Ex. Mr. Cathcart. Exception.

The Court. Understand the ruling, though. I do not yet hold that that proves the corporation. I think it is admissible.

A. We have acted as a corporation entirely since our corporate papers were taken out and having done business in nearly all countries.

The Court. What date was that, Mr. Bierce?

A. 23rd of December, 1899.

Q. Since that date you have acted as a corporation? A. Yes, entirely so.

Mr. McClanahan. If the court pleases, it is proper at this stage of the proceedings, we can and are now prepared to ask the question, which has not been brought up except in a dilatory way before, as to whether this defendant can raise this question or not.

(Argument)

The Court. What I want to know is whether Mr. Hutchins would be estopped because the Kona Sugar Co. is estopped.

(Argument.)

The Court. My view is, in the light of the argument 103 and authorities cited that the defendant, Mr. Hutchins, is estopped by reason of the dealings of the Kona Sugar Co. with the plaintiffs as a corporation, and that he cannot now be heard to deny their corporate existence.

Ex. Mr. Cathcart. An exception to the ruling of the court.

Mr. McClanahan. I would like to have the articles which we have offered in evidence received and identified by the clerk.

The Court. They may be received for that purpose.

(Marked "AA" for identification.)

Mr. McClanahan.

Q. You heard the deposition read of Columbus Bierce and Mr. Gilbert in this case did you, Mr. Bierce? A. Yes sir.

Q. Why were the 188 tons of rail not shipped to the Kona Sugar Co.?

Mr. Cathcart. I object. Incompetent, irrelevant and immaterial.

The Court. It seems to me it is immaterial. Objection sustained.

Mr. McClanahan. Save an exception.

Q. Did Bierce & Co. receive under the contract of March 13th, 1901 any money? A. Yes sir.

Q. How much? A. Ten thousand Dollars.

Q. To what was that credited on the books of Bierce & Co.? A. Credited to the—

Mr. Cathcart. I object, not the best evidence.

The Court. Objection overruled.

Ex. Mr. Cathcart. Exception.

104 A. Credited to the account of the Kona Sugar Co.

Q. What account? A. For the material we had sold them as of March 13th, 1901.

Q. Was any credit made on this payment to any particular item in the contract—of the goods sold under the contract? A. No sir, it was made on the general contract of March 13th, 1901.

Q. No credit was made to any particular item of that contract? A. No sir, because that was a lump sum contract for so much money, made by Mr. Gilbert.

Q. What did Bierce & Co. Ltd. receive the bonds which have been offered in this suit for? A. They received them as additional security to the note, which were finally to be surrendered when we were paid, when the note was paid.

Q. What was the note received for? A. For security for the material furnished.

Q. Have you ever been to the plantation of the Kona Sugar Co. Ltd. Mr. Bierce? A. Yes sir.

Q. When were you there? A. I was there on the 17th day of February last.

Q. This year? A. Yes sir.

Q. Did you see the goods which were sold to the Kona Sugar Co. under this contract of March 13th, 1901 while you were there? A. Yes sir and examined them all.

105 Q. What is your business, Mr. Bierce? A. Furnishing railroad equipment, particularly for plantations. I have furnished for the Hawaiian Islands Louisiana, Cuba, Porto Rico, Peru, Yucatan, Mexico, in fact nearly all over the world.

Q. How long have you been engaged in the business? A. Over ten years.

Q. Do you know the value of plantation railway equipment? A. I think I do, because we are dealing in them daily.

Q. Well did you make an appraisement of the value of the material furnished to the Kona Sugar Co. by your corporation? A. Yes sir.

Q. Will you please state what the value of the material so furnished is? A. You mean at the present time?

Q. I mean now. A. It is now worth 22 and 23 thousand dollars.

Q. In your inspection of the material furnished to the Kona Sugar Co. by Bierce, Ltd.—From your inspection, can you state what was used of the material so furnished in the construction, or rather what was not used of the material so furnished in the construction of their railroad? A. The material that was not furnished in the construction of the railroad?

Q. Not used you mean? A. Yes sir, not used I mean, that was not used in the actual construction of the road—

Q. Yes. A. Were some splice bars, some spikes, 16
cane cars, two locomotives, one hand car, one rail bender, four
track gaugers, two jacks, one track scale,—probably one
106 or two other small things that I can't remember.

Q. Those items of material were not used in the construction of the railroad? A. No sir.

Q. State whether or no Bierce & Co. have ever waived any terms or conditions of the conditional contract of sale of March 13th, 1901.

Mr. Cathcart. I object, incompetent, irrelevant and immaterial. That is the very question which the court has got to pass upon here.

The Court. Objection sustained.

Mr. McClanahan. Save an exception.

Q. What, Mr. Bierce, was the value of this property at the time of the commencement of his suit, July 20th, 1903? A. It was probably worth about 20% more than it is worth at the present time. I say "probably"; I think I can state positively that it was worth that.

Q. What was the value of this material on the 9th of May, 1903? A. It was worth 20% more than it is worth at the present time. That statement I made was between 22 and 23 thousand dolars.

Q. What was it worth on the first of June, 1903? A. Worth about the same as it was on the 9th of May, because very slight deterioration could take place in that time; amount of changes was very slight.

Q. What was it worth on the 20th of July?

Mr. Cathcart. That has been already answered. I object to it as having been answered.

Mr. McClanahan

Q. What would be, Mr. Bierce, the value of the use
107 of that material between the 9th day of May, 1903 and
the 20th of July, 1903?

Mr. Cathcart. I object. Incompetent, irrelevant and immaterial.

The Court. Objection overruled.

Ex. Mr. Cathcart. Exception.

A. The use of the material to the Kona Sugar Co. was absolutely essential to the operation of the sugar plantation. Without it it would have probably cost them more than the sugar was worth to gather the cane.

Q. What was the value of that use, Mr. Bierce; can you state?

The Court. How do you mean,—per month or—some way so as to get at it.

Mr. McClanahan. The value for the period from May 9th, to July 20th. A. Well, such cases are usually—

Mr. Cathcart. Same objection,—incompetent, irrelevant and immaterial.

The Court. Same ruling.

A. In such cases usually, Mr. McClanahan, they charge 25% annually of the value of the property.

Mr. McClanahan

Q. 25% annually of the value of the property? A. Yes sir.

Q. Is that the actual value of the use of the material? A. Well, that is only—

Mr. Cathcart. I object to that as leading.

The Court. Well, it has also been answered. Objection sustained.

A. I would like to—

108 Mr. McClanahan. The witness simply said that was the custom.

A. The general rule with large railroads.

Q. I want positive evidence as to the—what the value was. What is the actual value, Mr. Bierce, of the use of that property from May 9th to June 1st, 1903?

Mr. Cathcart. Same objection, incompetent, irrelevant and immaterial.

The Court. Well, I understand him to say the value was 25% per annum. Did you say custom"? A. No, I said, Judge,—I said that was a custom of large railroads. I don't think it exactly applies to plantation railroads.

The Court. That question may be answered then.

Mr. Cathcart. Exception.

A. I would say that a plantation railroad of that kind, that unquestionably the use of that material for taking off a crop of sugar would be at least 25% of the value of the property.

The Court. The question is, from May 9th to July 20th, what would be the actual value of the use.

Mr. McClanahan. Yes, 25% per annum or 25% for the period entending from May 9th to July 20th.

A. I would say for the period used.

The Court. Well, you say what, Mr. Bierce?

A. I would say from the 9th of May to 20th of July I would say worth 25%.

Q. Of its value? A. Yes sir.

Q. That would be of the value of 22 thousand or 23? A. Yes sir, between 22 and 23 thousand dollars, the value of the property.

109 *Cross-Examination of W. W. Bierce.*

Mr. Cathcart

Q. What did you say your business is, Mr. Bierce? A. Furnishing railway equipment, more particularly plantation railroads.

Q. Do you furnish railway equipment for ordinary freight railroads and passenger railroads? A. Yes sir, deal with them very largely.

Q. You say that the ordinary measure of the value of the use of equipment of this character is 25% per annum on its total value, eh? A. For large railroads, yes sir.

Q. In this case you figure that the value is—from May 9th to July 20th is—the value of the use is 25% of the total value of it? A. Yes sir, because the cases are not similar.

Q. Well, how do you reach the conclusion in this case? A. Well, one is a plantation railroad, that the railroad is absolutely essential to the taking off of the sugar crop and has much harder use than large railroads,—constantly under service; the deterioration is more.

Q. If it wasn't in use then for taking off sugar it would not be of any value at all during that time? A. Yes sir, it would be of value because it would deteriorate during that time.

Q. Then the deterioration would be the measure of its value during that time? A. No sir, the deterioration
110 would not be the measure of its value?

Q. What? A. No sir.

Q. Did you see this railroad on May 9th, 1903? A? No sir.

Q. Had you ever seen the railroad prior to your coming here or prior to February 17th of this year after it was shipped from your place? A. No sir, but I have seen lots of railroads similar to it, built lots of them.

Q. Did you ever see this railroad on July 20th, 1903? A. No sir. I have seen lots similar to it.

Q. You have spoken heretofore about dealings you had with Mr. Hutchins between May 9th—after May 9th and the commencement of this action; did you have any personal dealings with him at all? A. Yes sir.

Q. Oral dealings? A. Yes sir.

Q. Where did you see him? A. I saw him in San Francisco.

Q. When? A. Let's see. I saw him there on the last day of January, the first and second of February of 1904.

Q. Well, I was speaking about the dealings that you had with him that you have testified to, between the 9th day of May and the bringing of this action in July last year. A. That I personally have seen Mr. Hutchins?

Q. Did you have any personal dealings with him at that time? A. Yes sir, I think I did.

Q. Did you meet him? A. No.

Q. By letters? A. Yes.

111 Q. Written to you? A. No sir.

Q. Written to whom? A. Written to our attorney in fact, as I understand it.

Q. Who was that? A. Messrs. Kinney & McClanahan.

Q. They are your attorneys in fact, are they? A. Yes sir.

Q. How long have they been your attorneys in fact? A. At the time Mr. Gilbert turned this matter over to them, yes, I think sometime in 1901; the exact date I am not prepared to say, perhaps Mr. McClanahan can answer that.

Q. Is it the time Mr. Gilbert states he was out here in his deposition? A. Yes sir; they were also made attorneys in fact at that time, as I remember it. That was about March 13th, Mr. Cathcart.

Q. About March 13th, 1901. A. 1901, yes sir.

Q. So from the time that Mr. Gilbert came out here, along in the spring of 1901— A. Yes sir.

Q. Kinney, McClanahan and—your present attorneys have been your attorneys in fact, have they? A. Been our attorneys in fact ever since Mr. Gilbert's trip here.

Q. Now the only reason you have for saying there were any negotiations between Mr. Hutchins and yourself is based on letters to your attorneys in fact from him. A. I have had cablegrams from him.

Q. In July he has cabled to you? A. I think in June.

112 Q. In June did he cable to you from here? A. Yes sir.

Q. Where is that cablegram? A. I don't know; I don't think Mr. Hutchins did; I think our attorneys, Messrs. Kinney & McClanahan cabled from an interview they had had with Mr. Hutchins.

Q. Now your transactions with them were relative to the compromise affecting interests—your claim, was it not? A. Yes sir.

Q. And that is all that passed between you and Mr. Hutchins in your dealings together in San Francisco was relative to a compromise of the action, wasn't it, settling this claim of yours? A. Yes sir.

Mr. Cathcart. Now if the court please I move to strike out the testimony on the direct examination of this witness relative to dealings that he had with Mr. Hutchins, on the ground that they show—they were merely had relative to a compromise in San Francisco and here and also show that the dealings that were had were had between May 9th and July, were had, according to the witness' showing, with the attorneys in fact, not with the witness himself, therefore it is hearsay, that part of the testimony.

The Court. The motion to strike will be granted upon the ground that it is hearsay evidence, not upon the ground that because what was said or supposed to have been said involved a compromise, because I do not understand that because certain recognitions of rights or facts might involve a compromise, that they are thereby shut out. Upon the ground apparently that it is hearsay evidence the motion to strike will be granted.

113 Mr. Cathcart. And that will reach only that testimony from May 9th; that won't reach then the testimony of the witness as to what occurred between himself and Mr. Hutchins in January and February of this year?

The Court. Oh no, any conversations Mr. Beirce had personally with Mr. Hutchins, that will stand, because it was received and the court would have no right to consider it to the prejudice of any party, but it is received simply to show there were dealings between the parties.

Mr. Cathcart. I will take an exception to the court's ruling declining to strike out the testimony of the witness as

to what occurred between him and Mr. Hutchins in San Francisco testified to by him on his direct examination, such testimony now appearing—such negotiations now appearing to have been in the nature of a compromise or attempted
Ex. compromise between the parties.

Mr. McClanahan. We take an exception to the ruling of the court as far as it went.

Mr. Cathcart

Q. When was the first time you saw this material for which you are suing now? A. You mean all of them?

Q. Yes. A. The first time I saw it all was on the 17th of February, 1904, but I have seen parts of it before it came out here.

Q. Well, what parts of it did you see before it came out here? A. I saw the rails and cane cars and locomotives, principally all of it, I think.

114 Q. Do you manufacture these articles? A. Yes sir, we do, in a way, and in a way we do not; I will explain that. These are our own designs. They are given to the shop to build for us on contracts. We regard ourselves as manufacturers because it is through our designs that they are manufactured,—that is a portion of the material; of course we do not manufacture rails.

Q. Do you manufacture rails? A. No sir.

The Court

Q. Are they manufactured according to your designs or—

A. No sir. Judge, there is a regular rule under the Society of Mechanical Engineers all over the world that designs of rails are manufactured from.

Mr. Cathcart

Q. How are rails sold,—by the ton or how? A. Yes sir, usually sold by the ton.

Q. Can you state how many ton of rails there are down at this—on this plantation at the present time? A. I can state positively that it was 362.

Q. How can you say that? A. 362.

Q. You can state positively? A. Yes sir, of our rails there; 362 tons of our rails there.

Q. Of your rails there? A. Yes sir.

Q. How do you arrive at that fact which you have just stated, that 362 tons of your rails are there? A. By a counting of the rails.

Q. You counted them? A. Yes sir.

115 Q. Did you count them on February 17th? A. Yes sir.

Q. You are positive of that without any doubt? A. Yes sir.

Q. Now how many joints are there there for laying of your rails? A. Well, there are joints for laying these 362 tons of rails, and then there are sufficient joints there to lay the other,—the difference—the other 188 tons.

Q. Do you know how many? A. No. There should be four joints to each rail, though, Judge.

The Court

Q. How many tons did you say of joints, Mr.— A. Enough to lay 550 tons of rails.

Mr. Cathcart

Q. How do you know that there are that many there? A. Well, from the ones that I counted and the ones that I could see in the track was there. We didn't furnish what I saw lying around there, Mr. Cathcart.

Q. So you want to be understood as swearing positively that there are of those that you furnished enough joints to lay that many tons of steel rails. A. Yes, sir, I will be so understood.

Q. And you arrived at it from counting some? A. Yes, and others that I saw around there.

Q. Now how many of your spikes are there, railroad spikes? A. Enough to lay 550 tons of rails.

Q. Well, how many would it take to lay 550 tons? A. I don't know in exact kegs how many it would take. It
116 depends upon the cross ties, but judging as nearly as a man can who is familiar with those things, from the pile of spikes that I saw there, so unused, I don't think there was any doubt but there was the 550 tons. I know we delivered that much—I mean of spikes to lay 550 tons.

Q. But I don't know how much it would take. Do you know? A. How many spikes it would take?

Q. Yes, I don't know how many. A. That depends how near the cross ties are together.

Q. Well, such as there were there. A. Yes, sir, I think Judge, I think unquestionably there was enough spikes there to lay 550 tons of rails, probably more, because the cross ties were not laid as close as good railroading would ask.

Q. I would like to know how many, if you can tell us—give us any idea as an expert. A. I don't know. By referring to a paper I might be able to tell. I don't say here in actual detail how many spikes were there,—that is how many kegs of spikes.

Q. What is this split switch material? A. That is switches for joining the main line of the railroad.

Q. That— A. Switches so as to allow the car to run in and out and run off alone.

Q. How many are there now? A. Ten.

Q. Of the property that you claim in this case ten? A. Ten, yes sir.

Q. How do you know that? A. By seeing them.

117 Q. How many cars are there there? A. 16 cane cars.

Q. How do you know that? A. By seeing them and counting them.

Q. How many saddle tank locomotives? A. Two.

Q. Did you recognize these as the ones you had furnished? A. Yes sir, I did.

Q. You have seen these before they came out here? A. Yes sir.

Q. Have you got a mark on them, your brand on them; was there any mark? A. I have a mark. Yes sir, there is a mark on them.

Q. What is it? A. Well, it is a mark that we gave to the—I think it is named, "Kona Sugar Co. No. 1" and "No. 2" as I remember it.

Q. Any mark of your own I mean? A. Well, there's lots of marks of our own that we can identify that particular type of 9 by 12 and 9 by 14—10 by 14.

Q. You didn't put any plate on them with your name? A. No sir, we didn't build them. Dixon Locomotive built them.

Q. Would you be able to identify them from other locomotives manufactured by the Dixon Locomotive Co.? A. Yes sir, those are the only type of locomotive we use. It is the type of locomotive that we use, Bierce uses.

Q. Now how many scales were there there? A. One.

118 Q. How did you recognize that? A. From the many we have sold and dealt in.

Q. It is a Howe Narrow Gauge Track scale, is it? A. Yes sir, 36 inch scales.

Q. Is there any special mark on that by which you recognized it? A. No, except generally. I know that scale.

Q. Is it something that is peculiarly built for you at your — A. Yes sir.

Q. Isn't manufactured by anybody else—for others, only for the firm of Bierce & Co.? A. Not this scale wasn't.

Q. What's that? A. Not this scale wasn't.

Q. I mean this kind. A. I couldn't say as to that, I don't know. This was particularly manufactured for us.

Q. What mark is there; how did you recognize it as being the one that was particularly manufactured for you?

Mr. McClanahan. I object to that question as immaterial. I thought the counsel was testing his credibility as an expert, but this question doesn't go to that, and a good many others that have been asked and answered.

The Court. Objection sustained.

Mr. Cathcart

Q. What is the value—what was the value of—

(Here the court took a recess until two o'clock.)

119 Afternoon Session,
Mar. 8, 1904.

Cross-Examination of W. W. Bierce, Resumed.

Mr. Cathcart.

Q. You say that the value of this property when you were down there on the 17th day of November was between 22 and 23 thousand dollars. A. On the 17th day of February, Mr. Cathcart?

Q. February. A. Yes sir.

Q. What did you say the deterioration was from the time of the commencement of the suit to this time? A. Up to this time?

Q. Yes, up to the time.—20% did you say or 25? A. I didn't say the deterioration was 20%. I said the value the difference in the values of the material now.

The Court. The value of the use from the 9th day of May to the 20th day of July was 25% of the value mentioned, —that is, 22 or 23 thousand dollars.

Mr. Cathcart

Q. That is the value of the use? A. That is the value of the use, but he is asking me, as I understand it—Do you want to know what the deterioration was or the difference in value?

Q. Well, the difference in value, that would be the deterioration? A. No.

120 Q. Well the difference in value from the time of the commencement of the suit up to now is 20%? A. Yes sir.

Q. And how do you arrive at that? A. By market values that we are dealing in every day.

Q. You mean that the prices of these have gone down? A. Yes sir.

Q. You mean that it is worth less than— A. Yes sir, I mean—

Q. According to the market value? A. Yes sir, according to the market value.

Q. You are not figuring then on the deterioration of any of the items at all of this property? A. No sir, not in that statement. There is a deterioration of the property.

Q. Now the value of the material on May 9th, and—between that and the time of the commencement of the suit you say was 20% difference in the value? A. Yes sir.

Q. Well, was it worth 20% more on May 9th than at the time of the commencement of this suit? A. Yes sir.

Q. And had prices fallen 20% in that time? A. Yes sir, about that. That is just the time of the decline in the market.

Q. So between May 9th, 1903 and up to now there has been a 40% decline in the value of these products, these materials? A. No, 20%.

Q. 20%? A. Yes.

121 Q. Well, when you answered that question as to the difference in the value between May 9th and the time of the commencement of the suit you meant that that covered the same period as up to now,—that is, that between May 9th and up to now there has been a fall of 20% in the value of the property? A. Up to May 9th, yes sir, and up to now.

Q. Now what is the life of one of these locomotives that you have sold,—their average life? A. Well, that depends a good deal upon its care.

Q. Well, that is ordinary care, the average life I say? A. 25 years.

Q. And of the other locomotives the same? A. Yes sir.

Q. What is the average life of the rails? A. Well, I would say over in Kona District, where there was not so much salt air, that the average life of the rail would probably be ten, twelve years.

Q. 10 or 12 years. Steel rails are they? A. Yes sir.

Q. What is the weight of these rails? A. 25 pounds to the yard.

Q. In going over this line of railroad, you stated you went over it and counted the rails? A. Yes sir.

Q. Were all the rails you saw of that weight. A. No sir, all the rails I saw of mine were of that weight.

Q. Do you know as a matter of fact that there is 20 tons of your rails that are not down there at all? A. No sir, I don't know, neither do I believe it.

122 Q. Wouldn't believe it? A. no sir.

Q. Did you walk over this line of railroad? A. No sir, I rode over it. Rode over it and walked over it too,—did both.

Q. Eh? A. Did both. I will explain that, Mr. Cathcart if you will permit me. You know these rails weigh 35 pounds to the yard and they are thirty feet long, and by counting the rails and computing the weights you can easily enough tell what the tonnage is. That is the way I arrived at it.

Q. So you couldn't be convinced that there were twenty tons of your rails that were not there? A. No sir, under no conditions could I be convinced of that.

Q. How do you arrive at your estimate of the value of the use of this property between May 9th and the date of the commencement of the suit? A. How's that? How do I arrive at the use?

Q. The value of the use. A. The value of the use? Well, to the Kona Sugar Co. it is—I take it that that is about the time they are taking off their cane and it is a crucial time in their harvest that makes it very essential to the railroad, and if you would ask me as an expert what it would be worth to them I say at least that to the Kona Sugar Co. Now I would like to qualify, and if the court permits, something that I said this morning as to the difference in the value as to Bierce. I would think that Bierce would be entitled to the interest of the value of the property. You see there's two propositions there. The Kona Sugar Co.,—I regard
123 it worth 25% to them. To Bierce I would regard it to
be worth the interest of the full contract price,—that is, $47,044.53.

Q. Well, but all this—that was the contract price of all the material wasn't it? A. Yes, less the $9,000 worth of rails that were not delivered.

Q. That is you would consider that—This is what you consider would be your—what you ought to have would be the interest on that $47,000 less the $9,000 worth of rails for that period, for that time? A. For that period. That, however, doesn't cover the depreciation in value, the market value, of the material, which I regard as 20%, and also the deterioration, which I regard as ten per cent. It is three propositions there, three items, Mr. Cathcart. First is the interest on the money, then is the deterioration, then is the difference in the market value.

Q. Now if there was no—if the railroad wasn't used in taking off any sugar during that period of time, why of course it would not be of the same value to the Kona Sugar Co. would it, or to the defendant rather? You reach your estimate or basis on using this railroad in taking off the sugar crop, don't you?

Mr. McClanahan. I object to the question as immaterial what the value of the use of the property is to the defendant or the Kona Sugar Co.

(Argument)

Mr. Cathcart

Q. I would like to get a little more of this drop in
124 value of the property. What was the—You say the market price has fallen on all these goods? A. yes sir, just about that particular time.

Q. About that time? A. yes sir.

Q. Well, when was the drop? A. Along in May, 1903.

Q. Was it before May 9th or after May 9th? A. No, technically there, about that time Mr. Cathcart.

Q. May have been before then and may have been after, you can't say positively? A. No, it was about the first of May.

Q. About the first of May? A. Sometime.

Q. Now has there been any drop in value since that time or was that the time of the slump? A. Oh, that was the time, the slump. Usually — these values usually come in rather drastic sums.

Q. All at once? A. As a rule yes sir.

Q. Now you say there has been a deterioration in value of ten per cent? A. Yes sir.

Q. On all the property? A. Yes sir.

Q. On this big locomotive for instance? Now we are speaking between May 9th to this time? A. Technically so. On all of it?

Q. Yes. A. No, I got that on kind of an average. The big locomotive I would say had no deterioration.

125 Q. And you are speaking now—I am speaking now between May 9th and the time of the bringing of this action. A. Yes.

Q. And up to this time? A. Yes sir.

Q. And you are speaking also, are you? A. Yes sir.

Q. You didn't see it—You never saw any of this material after it was shipped in 1900? A. No, but I am very familiar with what condition that class of materials should be in.

Q. Well, as you say that it has deteriorated ten per cent from the actual cost value at the time it was bought? A. Yes sir.

Q. Well, That deterioration covers a period then of from the time it was shipped by you up to this present time, does it? A. Yes sir.

Q. And you can't say that the whole of that deterioration occurred within the months that you have named, from May 9th up to here? A. No, but I would like to make an explanation to the court about that.

Q. Well, go on and get your explanation right along. A. While the material is new, and say for a year, there is nominally no deterioration, and when it does commence to deteriorate why it deteriorates more rapidly, say the first year or eighteen months or two years' use of it.

Q. Well, at this rate, at the rate you fix of ten per cent, the life of the plantation material would only be about ten years? A. You asked me about the rails, not of all the material.

126 Q. I asked you about the steel rails and the locomotive. A. The locomotive I said 25 years; the steel rails I said ten or twelve.

Q. I think you said 11 or 12. A. I said 10 or 12, I think, may be 11 or 12.

Q. Do the rails show such signs of wear? A. Some little.

Q. They do show. These rails—You say you went over the road-bed? A. Yes sir.

Q. And examined these things. These rails are laid on this road-bed, are they, and spiked down to the road-bed?

Q. The cross ties are on the road-bed? A. Yes sir.

Q. How many miles of them are there, do you know? A. Our rails six and a fraction. I could tell you acurately if by allowing a little figuring. 35 pound rails to the yard, takes 55 tons for a mile.

Q. Well, I know, but I want to know if you can tell by your inspection of it? A. Little over six miles.

Q. You yourself reside in Chicago, do you? A. Yes sir; spend a part of my time, however, in New Orleans.

Q. And New Orleans is the— A. Headquarters.

Q. Headquarters. A. My brother has charge of the New Orleans office.

127 Q. The sales that were made in Hawaii that you have reference to was this sale to the Kona Sugar Co? A. Yes sir.

Mr. McClanahan. I object to that as improper cross examination.

The Court. It is already answered. I guess it won't hurt anything.

Mr. McClanahan. Exception.

Mr. Cathcart

Q. That is the only transaction you have had in the Hawaiian Islands is it? A. No sir.

Q. Had others? A. Yes sir.

Q. They have been consummated--this transaction with the Kona Sugar Co. was consummated by an agent of yours?

Mr. McClanahan. I object to that as improper cross examination.

Mr. Cathcart. I want to show that the dealings were through agents here, that's all.

The Court. Objection overruled.

Mr. McClanahan. Save an exception.

A. Why I would answer that in this way: that the agent made the negotiations but I think I formally signed the contract.

Q. But you were then in Chicago? A. I cannot say whether I was in Chicago or New Orleans at that time.

Q. What I mean is your personal presence on the Islands. You haven't been personally present on the Islands with reference to any of this transaction at all until you came down this time?

Mr. McClanahan. I object to that as improper cross examination.

A. Yes sir, I was.

The Court. Objection sustained.

128 Mr. Cathcart

Q. Let me see, you took—you say you took the bonds. You took a note as security for this material? A. Partially so. I took the note as security. I took 76 bonds as additional security, and as further and final security I withheld title to the property in question here until the note for the $47,044.53 had finally been paid, and when that was paid I would have surrendered the note and the bonds and also the title to the property.

Direct Examination of M. F. SCOTT, Called and sworn.
Mr. McClanahan

Q. You were at one time receiver of the Kona Sugar Co. were you not, Mr. Scott? A. Yes sir.

Q. And as such you took possession of the assets and property of the Kona Sugar Co? A. Yes.

Q. State whether or no the Kona Sugar Co. had any interest in the land over which the Kona Sugar Co's. railroad ran? A. Yes, it had interest in the land.

Q. In all of it? A. In all of it excepting one holder, and right there was, as I understand since, a permissive right. At the time I thought it was a written right. At the time I thought it was a written right; since that time I have understood it is only a permissive.

129 Q. The right of a license? A. Yes, sir.

Q. Whose land was it? A. J. D. Paris.

Q. How much of the railroad ran on the Kona Sugar Co.? A. Well, there is a total length of about seven miles and a half, including the line of track laid, of which about a little more than six miles was made of the rails of Mr. Bierce. The portion of the rails—A portion of the railroad on the Paris land was made wholly of other material, and the distance on Mr. Paris' land is about) is a mile, more than a mile, and over that there was only a permissive right.

Q. Now will you please answer my question; you didn't quite understand it. How much of the land belonging to the Kona Sugar Co. did the railroad run over? A. Well, you mean the land in fee or land in which they had a right, a lease?

Q. Let's have the fee first; we will devide them. How much of fee simple land owned by the Kona Sugar Co. did this railroad run over? A. Well, there are two tracts which they own a right in fee, and another undivided tract in which they had an undivided interest. The two tracts would aggregate about a third of a mile. The undivided land in which they had an undivided interest would be about a little less than two-thirds of a mile. That was all the fee simple land, though.

Q. Now what other interest did the Kona Sugar Co. have in land over which this railroad ran? A. Leasehold interest.

130 Q. Whose leasehold; who was the lessor? A. Well, beginning at the mill the first lessor was the Kapiolani Estate.

Q. How much of the tract ran over that piece of land? A. They have two tracts, two tracts of land. The first one the mill stands on and the track starts from the boundary, that is it runs across the entire width of it and also includes all the side tracks surrounding the mill, and that tract there is,—I can only give you these distances approximately,—I suppose it is about four hundred feet across the tract. Then there is a switch running the entire distance across it and then there is a spur track of about 500 feet.

Q. 500? A. 500 feet. Then—That is not the extreme north end of the road. There is a little—another tract still north of that from whom they obtained a right of way from Kunuiakea.

Q. Have you given me all of the track on Kapiolani Estate land? A. On the first tract I have.

Q. That is about 1300 feet? A. I better begin at the end of the road and proceed along,—Would be a more intelligent way of giving this evidence. I should have begun there first. The extreme north end of the road begins on land owned by the Catholic Mission, sub-let to a native or leased to a native. The native sub-leased to two Japanese and the Japanese granted a right of way to the Kona Sugar Co. over the land.

Q. In writing? A. In writing.

131 Q. When was that grant made? A. That grant was made in September, 1901, in August, September, October, along there sometime.

Q. Before or after the rail was laid? A. Before the rail was laid; was not before the rail was commenced. The railroad, construction of the railroad was blocked for several months in order to get the right of way, and they—they have had to pay $500 to secure the right of way.

Q. In 1901? A. Yes.

Q. How much of the road ran on that right of way—How long was their piece on the right of way? A. Between four and five hundred feet of track.

Q. How long was the right of way, the license, how long did it extend? A. During the residue of their right.

Q. During the residue of whose right? A. These Japanese right, which I believe is six or seven years.

Q. Now what is the next piece? A. The next piece is the Kapiolani Tract, which I have just stated.

Q. Yes. A. The next—

Q. That is 1300 feet? A. Including all the spurs and side tracks.

Q. How long was that lease for? A. I think about 30 years.

Q. Thirty years? A. I think there is an extension of the lease, clause in the lease that extends it approximately thirty years.

132 Q. Now what is the next piece? A. The next is Wilberoth, Henry Wilberoth's land and the distance across that is perhaps 600 feet.

Q. 600 feet? A. Might be a little less, 500 feet.

Q. How did they get the right to pass over that land? A. By a written right.

Q. Right of way? A. Yes.

Q. When was that obtained? A. In 1901.

Q. Before or after the road was made? A. Before.

Q. Before the road. How long does that right, that license, extend? A. 30 or 50 years, I have forgotten which.

Q. What is the next piece of land? A. The next piece of land is Sophia Coburn, Sophie—Mrs. Sophie Coburn.

Q. How long is the track over that land? A. That is four or five hundred feet.

Q. And how do they have the right there? A. By a written lease.

Q. Lease or right of way license? A. License, right of way.

Q. Right of way. A. Yes.

Q. How long is that for? A. I am not sure whether it is 30 or 50 years. It is a long time.

Q. I see, and was that obtained before or after the railroad was constructed? A. Before.

Q. What is the next piece? A. The next piece is the—is a Kapiolani Tract. Now wait until I see. Yes, a Kapiolani Tract.

133 Q. How long is the track over that land? A. 300 feet perhaps.

Q. How does that right obtain; what is it, a license or leasehold? A. It is a leasehold.

Q. How long is the lease? A. It has an extension clause for 30 years.

Q. What is the next piece? A. The next piece is—I forget the name of the piece. It is one of the pieces that the Kona Sugar Co. had in fee.

Q. One that they had in fee? A. Yes.

Q. Undivided interest? A. No, in fee, in full possession.

Q. Third of a mile run over that? A. Approximately.

Q. Now what was the next piece? A. Puapuanui, belonging to the Greenwell estate.

Q. How much track ran over that? A. Six or seven hundred feet—No, it is more than that. It is perhaps seven or eight hundred feet.

Q. How did they have a right to go over that land? A. By a right of way or lease of the right of the right of way.

Q. Is this a lease or right of way, a license or right of way—or lease? A. It is a right of way. They have the—they have a lease of a portion of the tract.

Q. Puapuaiki, don't they lease that? A. Part of Puapuanui, but I believe that that land which they have leased does not extend quite down to the railroad;
I think it only extends to the road and the rail-
134 road just near the boundary of that land crosses the road
and runs below the road, and it is a right of way.

Q. How long does that right of way, that license, extend? A. I think it is fifty years. Most of those rights of way were fifty.

Q. Was this obtained before or after the construction of the road? A. Before.

Q. What is the next piece of land? A. The next piece of land is Holualoa 1 and 2 in which the company owned an undivided interest.

Q. How long is the road over that land? A. Well, within that land there are two other grants; within these lands were two other grants, and the trackage on the Holualoa 1 and 2 proper I think is between a half and two thirds of a mile.

Q. How long is the track over those two grants that are within Holualoa? A. Over the first one which is known as

—the name has slipped me—it is perhaps between three and four hundred feet across it.

Q. What is the interest of the Kona Sugar Co. in that? A. They have a right of way across it.

Q. A written right of way? A. A written right of way.

Q. Was it obtained before or after the construction of the road? A. Before the construction of the road.

Q. Now that piece within there, how long is the road over that? A. That is between four and five hundred feet.

Q. And how do they have an interest there?
135 A. A right of way across it.

Q. A written right of way? A. Yes.

Q. How long does it extend for? A. Fifty years I think.

Q. Was it made before or after the construction? A. It was obtained before

Q. What is the next piece of property? A. The next is known as Holualoa 3.

Q. And what is the distance across that? A. The distance across that is between five and six hundred. I should say it is five or six hundred feet.

Q. And how do they have an interest in that land? A. A right of way across it.

Q. In writing. A. Yes.

Q. Obtained before or after the construction of the road?
A. Before.

Q. What is the next piece? A. The next piece is Holualoa 4, which the Kona Sugar Co. own in fee.

Q. What is the distance across that? A. Distance across that is perhaps between 800 and a thousand feet.

Q. What is the next right of way? A. The next is Pahoehoe, of which there are 1, 2, 3 and 4.

Q. What is the distance across that land? A. The distance across the four lands is something like between six and eight hundred feet.

Q. What is the interest of the Kona Sugar Co. in that land? A. One of them was a leasehold interest; the
136 others are rights of way, that is—

Q. And obtained before the construction of the road? A. Obtained before the construction of the road.

Q. And when does the lease expire? A. I am not sure what is the length of the lease; it was a pretty long lease, though.

Q. What is the next land? A. The next lands were the lands formerly of the Hawaiian Coffee & Tea Co. afterward the Kailua Coffee Co. and at this time belong to to Vasconcevelo and M. V. Sousa, under mortgage to the Lunalilo estate of which W. O. Smith was Trustee and his associates. There right of way is, or their license there is a right of way across that for fifty years, in which the owners of the land at that time joined, and also the mortgagors—mortgagees—joined in the right of way across.

Q. Was that obtained before or after the construction? A. Obtained before.

Q. What is the next item? A. Wait a minute please. There is so many of these lands perhaps I may get them a little confused. Between Pahoehoe's and this land that I have last described was Kamalomalo, of which the Greenwell estete were the owners in fee, and there were some tenants and the right of way was signed by all of the parties, the owners of the fee and the tenants.

Q. Before the construction of the road? A. Before the construction of the road.

Q. And what is the distance across those lands? A. Well, up to a thousand feet, I should think.

137 Q. Any other lands? A. Well, the next, the land land I have described, is this Hawaiian Coffee & Tea lands. Then comes—there are also along within these lands a few kuleanas that are crossed for which rights of way were obtained, that I may have omitted. The next land after these is Keauhou 1 and 2.

Q. What is the distance across those? A. The distance across that is between a mile and a half and two miles.

Q. What is the interest of the Kona Sugar Co. in that land? A. A right of way across it.

Q. In writing? A. Yes.

Q. Obtained before or after the construction of the road? A. Obtained before.

Q. What other lands are there? A. The next land I am not sure whether it is Honalo or not; I think it is. The land is owned, I think, by Isaac Sherwood in fee. There are some tenants on the land from whom the right of way were obtained. I wouldn't be sure whether the owner Sherwood, joined in the granting of the right or not. I couldn't say for sure, positive, about that.

Q. What is the distance across? A. Four or five hundred feet.

Q. What is the next? A. Well, I think that at that point the Paris and the Paris interests' lands begin,—that is the Paris land, Mrs. Roy's land, Mrs. Robertson's land, and Shipman's, I think, further on to the end of the track.

Q. Now is that the land which is farthest from the mill? A. Yes.

Q. The Paris land and the Paris interests? A. Yes.

138 Q. Where did you get your knowledge of these rights of ways coming from—obtained? A. From the writing instruments in my possession at that time.

Q. They were in your possession? A. Yes.

Cross-Examination of M. F. Scott.

Mr. Cathcart

Q. At what distance from the mill does the Paris land commence,—that is the Roy land, the lands represented by the Paris interests? A. Well, it is more than six miles, it is more than six miles to the mill.

Q. Are any of those—of the rails that are laid on this Paris interests land rails that were sold by Bierce to the Kona Sugar Co. A. No.

Q. They are different rails entirely? A. Different rails entirely.

Mr. McClanahan. We now ask the court, and with the consent of counsel, that the papers introduced in the McChesney suit be taken as read in evidence without going through them, with the privilege of either counsel reading them in argument.

The Court. These are the papers which you pointed out certain papers which you wished to offer?

Mr. McClanahan. Yes, McChesney versus Kona Sugar Co.

139 The Court. Very well, considered as read.

Mr. Cathcart. Those that were admitted in evidence.

The Court. I understand.

Mr. McClanahan. We now ask to amend our complaint to conform to the proof, the deposition. On Exhibit—by amending our complaint, Exhibit "A" thereof on the second page of the exhibit by substituting J. M. McChesney, for F. W. McChesney and adding M. W. McChesney, blank, by its treasurer F. W. McChesney.

The Court. It may be amended accordingly.

Direct examination of E. B. McCLANAHAN, Called and sworn.

I am one of the attorneys for the plaintiff W. W. Bierce, Ltd. This matter was placed in our hands by Mr. Gilbert, agent for the plaintiff, I think sometime in the latter part of the year 1901. It that time we had a great many claims against the Kona Sugar Co. in our hands and we were very deeply interested in the affairs of the Kona Sugar Co., having frequent conferences with the officers of the Kona Sugar Co. There was an effort made on the part of the interested creditors, bondholders and stockholders of the Kona Sugar Co. to save the property—

Mr. Cathcart. This is all very interesting but I object to it as not being material to the issue.

Mr. McClanahan. It is preliminary to an explanation,
140 if the court please, of why certain things were done by
Bierce & Co. Ltd. which may be material in this case. We are going to be charged, as I have said over and over again with an election in this case, with an election of remedies; that we have elected to sue on a mechanic's lien and therefore are foreclosed from asserting our title to this property. I want to give evidence to show the reasons for the Kona Sugar Co. prior to the bringing of this suit.

The Court. Objection overruled, but try and keep as close to the point as possible.

Ex. Mr. Cathcart. Exception.

The Witness. As a result of a great many conferences between the officers of the Kona Sugar Co. and bondholders, stockholders and creditors, a committee was appointed, called a bondholder's committee, for the purpose of superintending the affairs of the corporation, which were then in the hands of a receiver, with the idea of and with the purpose of taking off the crop of sugar that was then maturing and realizing the sale of the sugar as an asset in order to pay the creditors of the corporation and clear its debts. This committee agreement was submitted to the court and received its approval, and under it for some time the receiver worked. The committee consisted of Cecil Brown, S. M. Damon and Mr. Humburg of Hackfield & Co. Prior to the making of this committee agreement on the 12th of May, we filed a notice of lien in this suit—in this matter. This lien was discontinued on the first of August, 1902.—No, suit was brought on this

lien on the first of August, 1902, and on the 23rd of Jan-
141 uary 1903, the suit was discontinued.

All of the acts which we did for Bierce & Co. at this time prior to the discontinuance of the suit looked towards the possible chance or possibility of saving the corporation's property. Everything was done to prevent an entire liquidation and surrender the loss of all these assets. When this purpose was finally abandoned it was because it was found to be impossible to save any of the assets of the corporation to pay anybody. We found that the receivers were running behind even in their receiver charges and couldn't pay the charges of the receiver itself, the receiver's certificates could not be paid. When this state of affairs came about and it was found then to be absolutely abortive and useless to attempt to do anything for the rehabilitation of the plantation, we then abandoned our mechanic's lien suit, dismissed it and had recourse to our replevin suit.

We didn't take this action in the first instance because we knew that to take those rails back, off the property of the Kona Sugar Co., would mean a collapse of the company at once, with loss of thousands to the creditors, because the railroad was absolutely essential to taking off a certain portion of the crop of the Kona Sugar Co., and the only reason for filing this lien which we thought we had a right to file at the time, without looking it up very carefully, the only reason for filing it was simply to fortify our position as a possible creditor or claimant of the estate

The Court

Q. At the time the lien was filed did Bierce and Co. claim the title to the property now in question? A. I will say
142 this in answer to that, That Bierce & Co. have never done anything but claim the title to the property under the conditional contract.

Q. Upon what theory did they expect to have a lien on the property as their own? A. When we filed this lien there was a certain provision in this creditors' contract which provided for a priority of payment of claims, and lien holders were preferred over certain other holders. We gave no thought whatever, at the time of filing the lien to whether it was a valid lien or whether it was an invalid lien. We have since learned that It was absolutely a nullity and of no value whatever to Bierce & Co. the filing of this suit. This is Bierce & Co's position from the start, so that they as bondholders occupied a more secure position in order to get their money than as lien-holders or common creditors, and it was the desire of Bierce to get their money in some way. They didn't want the property at the time, they wanted the money; they wanted the contract carried out; they wanted the note of the Kona Sugar Co. paid, and we simply filed this lien at the time as an additional lever on the—hold on the material so furnished. That is all.

Cross-Examination of E. B. McClanahan.

Mr. Cathcart

Q. When were you retained as attorneys for Bierce & Co. Mr. McClanahan, your firm? A. I am not quite sure. 143 I think it was the latter part of 1901.

Q. Mr. Gilbert has testified in his deposition that Mr. Ballou drew this so-called conditional bill of sale or conditional agreement. A. My belief is that Mr. Ballou drew that in San Francisco. He was away when he first met Mr. Gilbert. No, I can't be right there. I know that Mr. Ballou in San Francisco had something to do with Mr. Gilbert; Mr. Gilbert told us so when he came down here. I am not certain about the date when we were first retained,—when we were retained.

Q. Mr. Bigelow was a member of your firm, wasn't he? A. Yes.

Q. He really had charge of these matters, didn't he? A. No, he had—not of the matters that I have been talking about. I had entire charge of this matter during the period that I have been talking about, the matter of negotiating to save the property.

Q. Who drew the lien? A. I think Bigelow drew the lien.

Q. Who brought suit; who drew the papers for bringing suit on the lien? A. I think Bigelow did.

Q. You knew it was being done all the time? A. Yes.

Q. You say that under this bondholder's agreement the lienholders had priority? A. I think so, certain priority. The first—I think the first claims to be paid from the sale of the sugar were to the laborers, and I will say now that the laborers were raising Cain on that plantation, threatening all kinds of things unless they were paid, and that 144 was one of the things that entered into our consideration and attempt to save the property.

Q. You had no philanthropic motives about trying to save the property; your idea was to get your money out of it? A. No one wanted to see the Kona Sugar Co. wrecked.

Q. You say because of lienholders having certain priorities you filed your lien in order to get in there? A. I say that was one of the reasons. Simply we wanted to make sure of our position.

Q. You had full charge of the matter? A. Of what matter?

Q. Of this Bierce matter? A. At what period?

Q. During all this period? A. During the period I have testified with regard to the matters I have testified to, yes. The course of action pursued by our firm was at my suggestion and under my direction.

Q. I don't mean as to yourself in that question, I mean that the matter had been left with you entirely by Bierce & Co.? A. Oh yes, with our firm.

Q. To take such action and steps as you saw fit and proper in the premises? A. Absolutely, absolutely.

Q. The lien was filed when? A. The lien was filed three days before the committee's agreement was entered into, on May 12th, 1902.

Q. Three days before what? A. Notice of lien was filed three days before the date of the agreement among the creditors, which was dated May 15th, 1902. That would make the lien having been filed on May 12th, the notice of lien, on May 12th, 1902. On August 1st, 1902, suit was brought.

145 Q. Who was the receiver at the time? A. I couldn't tell you.

Q. In what court was the receivership pending? A. At that time in the Third Circuit.

Q. Before Judge Edings? A. Yes.

Q. That was the receivership in the suit of McChesney & Sons against the Kona Sugar Co. and the First American Savings Bank, Trustee of the bondholders? A. The suit was originally brought here. Fred Wundenberg was appointed receiver and discharged here, and then proceedings were brought over there and Mr. Scott, I think, was the first receiver; M. F. Scott was the first receiver, then Mr. Dortch was the second. Under Mr. Dortch the sale was made. Lien suit was brought on the first of August, 1902, discontinued on the 25th of January, 1903, at a time when things were chaos and everybody given up; in fact the bondholders had determined to write their bonds off at that time, absolutely total loss.

Q. I am cross examining you Mr. McClanahan. A. And giving me openings too.

Q. I hope you will not take advantage of them though. A. I will take advantage of them; sure of that.

Q. Oh, their property was to be sold along in December, this Kona Sugar Co. property? A. I think there were three orders of sale of the property. When the first order of sale—do you want me to tell about that?

Q. No, no. You filed a petition, did you not, in intervention, setting up your mechanic's lien in one of these 146 orders of sale? A. No, never.

Q. Asking for a modification of the order? A. Well, that is a different proposition. We did file a motion to be allowed to intervene for the purpose of modifying the order of court, which was to sell the property free and clear of all liens. Our suit in intervention was of the nature of an equitable replevin, which was filed after we had been denied the right to bring legal replevin against the receiver. We petitioned to be allowed to intervene for the purpose of bringing equitable replevin against the receivers.

Q. Well, that was subsequently? A. That was in December, I think, 1902.

Q. I am speaking about a petition in intervention before the first—after the first order of sale. A. I couldn't give you the date of the first order of sale.

Q. In which you set forth your notice of lien and your action on the lien and you asked a modification of the— A. Order.

Q. Order. A. And we got it.

Q. By which if a sale took place your lien—your rights upon your lien would be preserved? A. Yes sir.

Q. That was in November of 1902? A. November? I think it was December. I may be mistaken. I may be mistaken; I think it was December.

147 Mr. McCanahan. We offer in evidence the minutes produced from the custody of the defendant, of the Kona Sugar Co., Kona Sugar Co's Directors' meeting of March 16th, 1901.

Mr. Cathcart. I have no objection.

Mr. McClanahan. "Minutes of Directors' meeting held March 16th, 1901. Present J. M. McChesney . . . . therefore be and the same is hereby approved and ratified by the Directors of the Company."

(Book received and marked Plaintiff's Exhibit "I").

Plaintiff rests.

Mr. Cathcart. At this time I desire to make a motion to strike out of the evidence certain portion of the deposition of W. W. Bierce—of Columbus Bierce—which was read in the early part of yesterday during the trial. The question is contained in the 40th interrogatory, in which it reads as follows: If, in answer to the last proceeding interrogatory you have stated, among other things, that during the middle . . . . ran.'' I objected to that as being incompetent, irrelevant and imaterial. The court overruled my objection. The answer was read and I moved to strike it out. I think at the time the court held, however, that he would allow it to remain in for the time being until it was connected up and made material by the plaintiff. Now I base this motion more particularly on the ground that it is shown by his preceding answer to interrogatory 39 that the Bierce Co. turned the matter, the note and the collateral and agreements ''referred to in my testimony (Reads) . . . as they might deem advisable under all the circumstances.''

148 (Argues) So it shows, according to Columbus Bierce's own testimony, that this whole matter was placed unreservedly in the hands of Kinney, Ballou & McClanahan, who were on the scene of action. Now if that is so, it also appears in the testimony—by the testimony of Mr. W. Bierce, that this same firm not only were their attorneys at law, but were their attorneys in fact. If these things were so, then it is absolutely immaterial what W. W. Bierce—what information they had relative to the rights of the Kona Sugar Co. Ltd. in the land. (Argues)

The Court. Well, I think that the understanding between principal and agent, while the matter may be left, broadly speaking, entirely to the agent, still the principal does not give up his control and management of the affairs, and I think that we must presume, are bound to presume, that they consult together and advise together. A principal may offer some suggestion, perhaps. Therefore the motion to strike will be denied.

Mr. Cathcart. I save an exception to the ruling of the
Ex. Court.

I make a like motion in reference to Interrogatory 41 and the answer to Interrogatory 41. (Reads)

The Court. Well, the same ruling of the court applies.

Ex. Mr. Cathcart. And exception, if the court please.

I desire to offer in evidence, if the court please, the order of the court and the preliminary motions relative to the bringing of the action on the mechanis'c lien, filed as testified to by Mr. McClanahan.

Mr. McClanahan. I suggest that we hear a statement of counsel.

(Opening statement for defendant made).

149 Mr. Cathcart. I have made my offer, I believe,—certified copies of the orders and motions made by the plaintiff in this case preliminary to his bringing suit on his mechanic's lien. He makes a motion to the court for leave to join the Kona Sugar Co. as a defendant in his action on his mechanic's lien,—in their action or its action,—and that was allowed.

Then I offer the certified copy of the complaint on the mechanic's lien, filed August 1st, 1902.

(Received and marked Defendant's Exhibits "1" and "2").

Now I would ask that the two exhibits that I have just introduced be considered as read for the purposes of the argument. I would like to introduce the petition of W. W. Bierce Ltd. in intervention, filed November 24th, 1902.

The Court. As I understand it these are offered for the purpose of showing an election?

Mr. Cathcart. Showing an election, yes, if the court please. I offer certified copy of the petition they filed at that time. It was a move on the part of the plaintiff.

Mr. McClanahan. Abortive moves do not count. It is whether we have elected between one or more effective remedies.

The Court. Well, objection overruled.

Mr. McClanahan. Save an exception.

(Received and marked Exhibit "3".)

Mr. Cathcart. I ask that that be considered as read for the purposes of filing.

(Here the court takes a recess until 9:30 tomorrow morning.)

150 IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, Territory of Hawaii.

W. W. Bierce,
vs.
C. J. Hutchins.

Mar. 9, 1904.

Direct examination of M. F. SCOTT, Recalled.

Mr. Cathcart.

Q. Mr. Scott, where do you reside? A. At Holualoa, Kona.

Q. How long have you lived there? A. 12 years.

Q. You were receiver of the Kona Sugar Co. from during what period? A. From March 28th, 1902 until November 5th, 1902.

Q. From March— A. 28th, 1902, to November 5th, 1902.

Q. Do you know when the defendant in this case took possession of the property that was sold at the time of the—on May 9th under the receiver's—under the court's order?

151 Mr. McClanahan. I object to that as immaterial.

The Court. Objection overruled.

A. On June 1st, 1903.

Q. Mr. Cathcart Are you familiar with the material constituting the railway down there, rolling stock, rails etc.? A. Yes, I am quite familiar with it.

Q. Can you state what is the condition of the railway material, including all rolling stock, the rails, etc.

Mr. McClanahan. I object to that. If it is an attempt to prove the value of the rolling stock I submit that this witness is not qualified as an expert to prove the condition or prove the value by showing its condition.

Mr. Cathcart. I am not trying to prove the value.

Mr. McClanahan. Well then, it is immaterial.

Mr. Cathcart. It is material as to deterioration.

Mr. McClanahan. This witness has not qualified to testify as to the deterioration of railway material.

The Court. Objection sustained.

Ex. Mr. Cathcart. Exception.

Mr. Cathcart

Q. Will you state what your knowledge is of this material and how acquired? A. Well—

Mr. McClanahan. I object to that as immaterial. If he is attempting to qualify this witness he can't show qualification to testify as an expert from knowledge of this material.

The Court. Objection overruled.

Mr. McClanahan. Save an exception.

Mr. Cathcart. As to the condition at a certain time of the material and its condition at another time. That is when
152 we took possession of it what was its condition; were there broken cars; were there rails worn?

The Court. Of course if the answer goes into that which calls for expert opinion I will entertain a motion to strike.

Mr. McClanahan. I object on the ground that it is calling for expert testimony and no proper foundation has been laid.

The Court. Objection overruled, on the ground that, as the court understands it, the question does not call for expert testimony.

Mr. McClanahan. Save an exception.

(Question read)

Mr. McClanahan. That is immaterial, his knowledge of this material, how acquired.

Mr. Cathcart. I will ask another question.

Q. Can you state the actual condition of this material in question here in that railway down there at the time that the defendant took possession of it?

Mr. McClanahan. I object to the question as calling for expert testimony and no foundation has been laid for the same.

The Court. Objection overruled on the ground that the court does not understand that the question does call for expert testimony.

Mr. McClanahan. Save an exception.

A. There were—there was at that time one broken car. There was at that time one broken car that has not been repaired or used since.

Mr. Cathcart

Q. What's that? A. It has not been repaired or
153 used since. The hand-car was damaged somewhat.

Mr. McClanahan. I ask that the answer to the question that has just been made, "hand-car was damaged somewhat" be stricken out, as there has been no qualification shown by which he can testify as to the damage to a hand-car.

The court does not know what the witness means. He is testifying as an expert.

The Court. That may be stricken out.

Mr. Cathcart. Exception.

Q. State how it is damaged then. Go on Mr. Scott and answer. A. I can just—

Q. Answer the question. A. I can just detail the damage to it. It was derailed prior, a year or more prior to that time and broken; repaired somewhat, fit for use and it has been used since. During the time that defendant has had possession of it he has used it somewhat,—some, not very extensive use. Beyond that the material—I am not sure that I understand exactly what you want me to answer.

Q. Simply what did you see; what defects, if any,—name them. A. Existing prior or since?

Q. No, between; I want to know—my question that is put, finding out the condition of this material at the time that the defendant took possession and its condition at the present time, showing what, if any, damages had been made or how it appears worn or how during that period of time—

The Court. The witness being desired to testify regarding certain particular facts or defects, if any, of the material.

154 A. With the exceptions I have noted all the material and equipment was in good working order at that time.

Mr. McClanahan. Now I ask that that answer be stricken out, this witness not having qualified as an expert to testify whether it was in good working order or not.

The Court. Objection sustained.

Mr. Cathcart

Q. Now state, if you can, what, if any, difference there is in the material, its appearance and, for instance, whether the rails appear more worn, whether the engines work less well now than on the day we took possession of it.

Mr. McClanahan. I object to that not having laid the foundation for testifying as an expert.

The Court. Objection sustained.

Mr. McClanahan. I ask the court instead of sustaining my objection to grant my motion to strike out the answer of Mr. Scott. There is a motion to strike.

The Court. Very well, the motion then will be granted.

Ex. Mr. Cathcart. Exception.

Q. Have you seen these—have you examined these rails lately?

Mr. McClanahan. I object to that as immaterial.

The Court. Objection sustained.

Ex. Mr. Cathcart. Exception.

Q. Have you seen the—There are two locomotives down there, are there not? A. There are.

Q. Can you state whether one of them has been used at all during this—the time of the possession by this defendant? A. Only one has been used. One has not been used.

155 Q. Where has that been? A. The one not in use has been in the car barn, the locomotive barn.

Q. You say that one car that is broken and out of use was—When was it broken and put out of use, do you know? A. It was in September or October of 1902.

Q. September or October of 1902? A. Yes.

Q. What is the situation of these rails in connection with the ground over which they run? State to the court.

Mr. McClanahan. I object to the question as immaterial and already gone over. This witness testified that the rails were on certain lands.

The Court. Objection overruled.

A. They are laid on the cross ties and spiked to the cross ties along the line of the railway of the Kona Sugar Co.

Mr. Cathcart

Q. Ballasted?

Mr McClanahan. I object to that as immaterial. The answer is immaterial in this case.

The Court. Objection sustained.

Ex. Mr. Cathcart. Exception.

I make an offer to show, if the court please, by this witness, that the rails on the line of this railway are attached to the freehold there, attached to the ground—attached to the freehold.

Mr. McClanahan. The offer is immaterial we submit, for the reason that they have admitted that they were in possession, admitted that they have retaken possession, and further it is immaterial for the reason that under a conditional contract of sale the vendee cannot, by attaching
156 these rails to the freehold defeat the title of the sellor.

Mr. Cathcart. We do not admit that this was ever in the possession of the defendant.

I make the offer to show just exactly how it stands in every respect.

The Court. I think it is proper for you to show, Mr. Cathcart,—to prove all the facts. As to asking this witness questions which would bring out conclusions it is a different thing, —as to whether it is attached—For instance he can go ahead and state facts,—spiked to the rails or to the cross-ties. Upon what are the cross ties?

Mr. Cathcart

Q. Upon what are the cross ties laid then? A. They are laid upon—

Mr. McClanahan. I object to that as incompetent, irrelevant and immaterial.

The Court. Objection overruled.

Mr. McClanahan. Exception.

A. They are laid on the track bed, and the greater portion of it is ballasted. Afterwards, perhaps some few short sections of it, little or no ballasting was done on—

Mr. McClanahan. I ask that that portion of the answer referring to the track being ballasted be stricken out as being irresponsive to the question.

The Court. The motion to strike is denied.

Mr. McClanahan. Save an exception.

Mr. Cathcart

Q. And this track—these are laid on the ground which you have described yesterday on your direct examination when the plaintiff called you here as a witness. A. Yes.

157 *Cross-Examination of M. F. Scott.*

Mr. McClanahan

Q. What was this car that was broken; what kind of a car was it, Mr. Scott? A. It was one of the 16 cane cars.

Q. One of the 16 cane cars? A. Yes

Mr. McClanahan. That's all.

Mr. McClanahan. Now if the court pleases, we now move to strike out all of the evidence of Mr. Scott that tends to show that the rails are attached to the freehold on the ground that the defendant is estopped by its own return bond to make any such defense.

The Court. The motion to strike will be denied.

Mr. McClanahan. Save an exception.

Mr. Cathcart. Mr. McClanahan, may I ask you when you testified that this mechanic's lien suit was discontinued?

Mr. McClanahan. 26th of January, 1903.

Mr. Cathcart. That is our case. Now you have no rebuttal?

Mr. McClanahan. No.

Mr. Cathcart. I will make now a motion for judgment for the defendant on the ground that it appears from the evidence in the case that this was not a conditional sale as claimed by the plaintiff but was a chattel mortgage; on the ground that if it was a conditional sale, then the plaintiff by this action has elected to treat it as an absolute sale and 158 is not entitled therefore to recover the property in this action by a suit of replevin.

The Court. The motion will be denied.

Ex. Mr. Cathcart. Exception.

(Argument)

159 IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT,

Territory of Hawaii.

W. W. Bierce, Ltd.
vs.
C. J. Hutchins.

Mar. 10, 1904.

Mr. Cathcart. If the court please, I at the close of the case yesterday, I asked permission of the court to amend my answer to conform with the facts as shown. The testimony of Mr. Scott, and the only testimony in the case as to when the possession was taken, is as follows: "Q. Do you know when the defendant in this case took possession of the property that was sold at the time of the—on May 9th under the receiver's—under the court's order? A. On June 1st, 1903."

Now if the court please I desire therefore to amend my answer by striking out the close of paragraph three of defendant's answer the words "and defendant then became, ever since has been and now is the owner in lawful possession thereof" and in lieu thereof inserting "and defendant, upon the confirmation of said sale on the first day of June, 1903, became, ever since has been and now is the owner in lawful possession thereof."

160 Mr. McClanahan. We object to the granting of this motion, first on the ground that the case has been closed. Evidence given—We would have, if the motion were granted,

no right of cross examination or rebuttal or right to introduce any proof on that question, if it is material.

(Argument)

And on the further ground that this is not a question of possession but the right of possession.

On the third ground that this defendant is not an innocent purchaser but he is chargeable with all that might be charged against the Kona Sugar Co., and that as the Kona Sugar Co's. default took place when we demanded of the receiver the possession of this property in our petition in intervention, that the defendant's default would date from that date and not from the time he received possession.

The Court. Well I think it is proper to allow the amendment, so that the defendant came into possession on the first of June. The amendment accordingly will be allowed.

Mr. McClanahan. We take an exception.

Now if the court please, we ask leave to reopen our case to call Mr. Bierce for the purpose of making proof of damage to conform with the amended answer of this defendant.

The Court. Motion to reopen the case is denied.

Mr. McClanahan. Save an exception.

(Argument.)

The Court. I therefore find judgment for plaintiff to recover the property as set forth in the complaint and upon failure to so recover it to be entitled to recover its value,
161 which I find to have been $22,000 on the first day of June,
1901, and by way of damages recover interest on the said sum of $22,000 at the rate of six per cent from the first day of June, 1901, up to the date of the judgment. Of course costs and all. Mr. McClanahan you can prepare what you consider the necessary facts leading to this conclusion and counsel may present them and I will give you a hearing upon them if you see fit.

Mr. Cathcart. The court will allow me to except to the judgment of the court as being contrary to the law and evidence and against the weight of evidence and give notice of motion for a new trial.

Ex. The Court. Exception is noted.

162 IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT,

Territory of Hawaii.

W. W. Bierce, Ltd.
vs.
C. J. Hutchins.

Exceptions to Findings of Fact, etc.

Mar. 19, 1904.

Mr. Milverton. In the Bierce case I would like to have the firm of Cathcart & Milverton to be entered as attorneys for the defendant in the place of J. W. Cathcart.

The Court. It is so ordered.

(Findings of fact read, also conclusions of law).

Mr. Milverton. May it please the court, in view of the fact that most of the questions raised by these objections have been at sometime during the progress of the trial passed upon by your Honor I do not intend to make any argument upon them, but merely present them and possibly make some slight argument as to some new points that are now raised for the first time. The objections to the findings of fact are as follows: (Read first objection)

The Court. Will we dispose of the objections as we go along?

Mr. Milverton. I think so, your Honor.

The Court. Objection number one is overruled.

163 (Second objection read)

The Court. That objection likewise will be overruled.

Mr. Milverton. We except to your Honor's ruling in overruling our objection No. 1 and also to overruling our objection No. 2. Ex.

(Reads third objection)

The Court. Same ruling.

Ex. Mr. Milverton. Exception.

(Reads fourth objection)

The Court. Objection overruled.

Ex. Mr. Milverton. Exception.

(Reads fifth ebjection)

The Court. /. /. /. therefore it will be overruled.

Ex. Mr. Milverton. Exception.

(Reads sixth objection)

The Court. That will be overruled.

Ex. Mr. Milverton. Exception.

(Reads seventh objection)

The Court. That is a conclusion; it also seems to be a finding. I think that I will have to overrule that also.

Ex. Mr. Milverton. Exception.

(Reads eighth objection)

The Court. That will be overruled.

Ex. Mr. Milverton. Exception.

(Reads ninth objection)

The Court. That will be overruled.

Ex. Mr. Milverton. Exception.

(Reads tenth objection)

The Court. That will be likewise overruled.

Ex. Mr. Milverton. Exception.

164 (Reads 11th objection)

The Court. Objection overruled.

Mr. Milverton. Exception.

(Reads 12th objection)

The Court. I will overrule it.

Mr. Milverton. Exception.

(Reads 13th Objection.)

(Argument)

Mr. McClanahan. Then we now move to amend the complaint in substituting $22,000 for $20,000 wherever the same appears in the complaint.

The Court. It is so ordered. The amendment will be made to conform with the proof.

Mr. Milverton. At this time in order to save the point we object to any such amendment being made, claiming that it is too late, and except to the ruling of the court.

The Court. And the other objection made, Mr. Milverton, I don't think that is well taken,—that each separate article should be set out,—therefore the objection will be overruled.

Mr. Milverton. Exception.

(Reads 14th objection.)

The Court. Objection overruled.

Mr. Milverton. Exception.

(Reads 15th objection)

Mr. McClanahan. We move to strike out "save as hereinabove qualified" and leave it that every material allegation has been proven.

Mr. Milverton. But we claim that that is not a proper finding of fact.

The Court. I think by striking out the words suggested 165 there by Mr. McClanahan that then it will be quite clear.

Of course I don't know that it helps any, and I am not sure that it hurts anything. The words "save as hereinabove qualified are stricken out.

Mr. Milverton. Exception to your Honor's ruling, and except to each and every ruling upon the objections to the proposed findings of fact.

The Court. Exceptions may be noted.

Mr. Milverton. Defendant's objections to plaintiff's proposed conclusions of law:

(Reads first objection)

The Court. Objection overruled.

Mr. Milverton. Exception.

(Reads second objection)

The Court. Objection overruled.

Mr. Milverton. Exception.

(Reads third objection)

The Court. That will be overruled.

Mr. Milverton. Exception.

(Reads fourth objection)

The Court. That will be overruled.

Mr. Milverton. Exception.

(Reads fifth objection)

The Court. That will be overruled.

(Reads sixth objection)

The Court. That is overruled likewise.

Mr. Milverton. Exception.

(Reads 7th objection),

The Court. That is overruled.

Mr. Milverton. Exception.

(Reads 8th objection.)

166 The Court. Objection overruled.

Mr. Milverton. Exception.

Mr. McClanahan. I ask the court then to allow the conclusions of law and findings of fact as passed upon and make such allowance on the papers as filed.

The Court. They will be allowed. (To the Clerk) Just mark it "allowed".

Mr. McClanahan. I present now to the court the decision in this case, filed the other day, filed with the bill of costs. Counsel have had notice and copy of the decision.

Mr. Milverton. We object to the decision and the signing of the same upon the ground that it is not supported by the evidence in the case and as contrary to law, and upon the further ground that the court has no authority to order an alternative judgment in said case, and upon the further ground that the decision should set forth the separate value of the different articles claimed by the plaintiff in this action.

The Court. Objection overruled.

Ex. Mr. Milverton. Exception.

(Here the bill of costs is passed upon)

Mr. McClanahan. We have now, if your honor please, a judgment in this case.

Mr. Milverton. I object to the entering or rendering of a judgment on the ground that the same is contrary to the law and the evidence and the weight of evidence, and upon the further ground that the court has no authority to render an alternative judgment or money judgment in an action of this character, and upon the further ground that the judgment should show the separate value of the different articles sued for and made the basis of this claim.

167 The Court. Well, the objection overruled.

Mr. Milverton. Exception.

After the signing of the judgment we again except to the judgment as contrary to the law and the evidence and the weight of evidence.

Mr. Cathcart. And give notice of motion for a new trial.

I hereby certify the foregoing to be a complete and accurate transcript of my shorthand notes of the testimony taken and the proceedings had in the above entitled cause on the trial and on the hearing on the findings of fact and conclusions of law.

J. L. Horner,
Official Reporter.

Mar. 28th, 1904,
2:45 P. M.

(Endorsed:) Filed April 16, 1904. P. D. Kellett, Jr., Clerk.

168 The stipulation and depositions of Columbus Bierce and Harry T. Gilbert and the exhibits thereto attached, and the notice, interrogatories and commission for taking said depositions and with which the same were returned, all of which were filed, attached together, in the office of the Clerk of said Circuit Court of the Third Judicial Circuit aforesaid on the 5th day of November, 1903, and were offered, received and read in evidence on the trial of said cause, and are in words and figures following, to-wit:

169 IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT

Territory of Hawaii.

December 1903 Term.

William W. Bierce Limited, A corporation,
Plaintiff.
vs.
Clinton J. Hutchins, Trustee,
Defendant.

Replevin.

Stipulation:

It is hereby stipulated and agreed by and between the respective parties to this cause that the interrogatories propounded to Columbus Bierce and Harry T. Gilbert in the case of R. W. McChesney et al vs. the Kona Sugar Co. Ltd., et al in the Third Judicial Circuit, said interrogatories having been issued at the instance of William W. Bierce Limited in a petition in intervention by it in the said suit, may be used by the plaintiff in the above cause with the same force and effect as if taken in the above cause; provided, however that the defendant herein may have ten days from the time the said interrogatories are returned to Henry Smith, Clerk of the Judiciary Department of the Territory of Hawaii, in which to propound cross interrogatories thereto if he so 170 desires and that plaintiff may have three days there after in which to propound redirect interrogatories.

Dated October 27th, 1903.

WILLIAM W. BIERCE LIMITED
By its Attorneys
KINNEY & MCCLANAHAN
CLINTON J. HUTCHINS,
Trustee,
By his attorney
JNO. W. CATHCART.

171 IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT

Territory of Hawaii

At Chambers. In Equity.

R. W. McChesney, J. M. McChesney and F. W. McChesney, carrying on a business under the name of M. W. McChesney & Sons,
Plaintiffs,
—*vs*—
Kona Sugar Company, Limited *et al,*
Defendants,
Kapiolani Estate, Limited *et al,*
Intervenors.

To Ralph C. Shaw, Esq., Monadnock Building, Chicago, State of Illinois.—Greeting—

Whereas, upon April 1st, 1903, a motion was filed in this Court, to-wit: The Circuit Court of the Third Judicial Circuit, of the Territory of Hawaii, at Chambers, In Equity, by William W. Bierce, Ltd., Intervenors in the cause of M. W. McChesney & Sons, Plaintiffs, vs. The Kona Sugar Co. Ltd., et al., Defendants, Kapiilani Estate, Ltd., et al., Intervenors, by which said motion they ask that you be appointed a commissioner to take the testimony of Columbus Bierce and Harry T. Gilbert, material witnesses in the above entitled cause, and whereas, said motion has been duly granted:

Now, Therefore, reposing confidence in your skill and ability I have apopinted you and do hereby appoint you, the said Ralph C. Shaw, as a commissioner to take the testimony
172 of the said Columbus Bierce and Harry T. Gilbert upon written interrogatories prepared and filed in this aforesaid cause by William W. Bierce, Ltd., and upon the cross interrogatories, if any, of M. W. McChesney & Sons, The Kona Sugar Company, Ltd., The First American Savings & Trust Company of Hawaii, The Kapiolani Estate, Ltd., L. M. Whitehouse, James A. Hopper Vompany Ltd., John D. Paris, Hannah Paris, Eliza Roy, W. H. Shipman, J. D. Johnson and W. H. Johnson, and each and all thereof, and upon the redirect interrogatories if any of the said William W. Bierce, Ltd., which said interrogatories, cross-interrogatories and redirect-interrogatories are to be sent to you

together with this commission by Henry Smith, Esq., Clerk of the Supreme Court of the Territory of Hawaii. And I do hereby authorize and empower you to cause to come before you the said Columbus Bierce and Harry T. Gilbert at such time and place as you shall appoint; And their several depositions upon oath to take upon the said interrogatories, cross-interrogatories and redirect-interrogatories which may be propounded to them respectively, which said depositions when so taken as aforesaid shall be read to and signed by the said Columbus Bierce and Harry T. Gilbert respectively, and shall be certified by you as such commissioner as aforesaid. And you are further commanded the said depositions when so taken as aforesaid together with this commission and your certificate as such commissioner to return under your hand and seal with all convenient speed to J. P. Curts, Esq., the Clerk of this Court at Kailua, Hawaii; hereby giving and granting to you all powers and authorities which may be necessary or proper to the performance of your duties as commissioner as aforesaid as fully and completely as though each of said powers and authorities were herein specifically enumerated and set forth.

173 And in the event of your being unable for any reason to act as such commissioner I do hereby authorize and direct you to appoint in writing any clerk of any court of record in Cooke County, State of Illinois to act as Commissioner for the purposes aforesaid, with all the powers and duties hereby given to and required of you, and to act as fully and completel herein and in all matters relating hereto with the same force and effect as though he were specifically named and appointed by the terms of this instrument.

In Witness Whereof, I have hereunto set my hand and caused the seal of this Court to be affixed.

Done at Chambers, In Equity, at Kailua, Island and Territory of Hawaii, this 17th day of April, A. D. 1903.

W. S. Edings

(Seal)

Judge of the Circuit Court of
the Third Judicial Circuit,
Territory of Hawaii, sitting
at Chambers, in Equity.

174 In the Circuit Court of the Tjird Judicial Circuit.

Territory of Hawaii.

At Chambers. In Equity.

R. W. McChesney, J. M. McChesney & F. W. McChesney, Carrying on business under the name of M. W. McChesney & Sons,
Plaintiffs.
vs.
The Kona Sugar Company, Limited, a corporation, and the First American Savings and Trust Company of Hawaii, Limited, a corporation,
Defendants.
William W. Bierce, Limited, et al.,
Intervenors.

Interrogatories of William W. Bierce Limited to Be Propounded to Columbus Bierce.

I.

What is your name?

II.

What office, if any, do you hold in the corporation William W. Bierce Limited.

III.

If your answer to the last preceding interrogatory is, that you hold the office of Vice-President, state how long you have held that office?

175 IV.

State if you know whether William W. Bierce Limited ever had any dealings with the Kona Sugar Co., Ltd., a corporation of Hawaii, relative to certain rails, engines, cars and other railroad equipment?

V.

If your answer to the last preceding interrogatory is in the affirmative, state if you know when and how these negotiations began and what was done thereunder?

VI.

If in answer to the last preceding interrogatory you have stated among other things that one Frank Davies was sent to Honolulu to act as the representative of William W. Bierce, Ltd. in regard to these negotiations, state whether the authority of the said Frank Davies was written or oral.

VII.

If in answer to the last preceding interrogatory you have stated that his authority was written, please state if the said power given to him is in existence.

VIII.

If your answer to the last preceding interrogatory is in the affirmative, please produce, identify and attach the said power to your answer as an exhibit thereto.

IX.

If your answer to Interrogatory VII is in the negative, please state whether you have a copy of said written power.

176 X.

If your answer to the last preceding interrogatory is in the affirmative, please produce, identify and attach the said copy to your answer as an exhibit?

XI.

If your answer to question IX is in the negative, state if you know the contents of said written authority?

XII.

If your answe to question VI is that the authority given to the said Frank Davies was oral, please state what that authority covered.

XIII.

Do you know the handwriting of the Frank Davies referred to in the preceding questions and answers?

XIV.

If your answer to the last preceding interrogatory is in the affirmative, please examine the letter dated Honolulu, February 21, 1900, addressed to the Kona Sugar Company, Limited, which is attached to these interrogatories made a part hereof and marked exhibit "A" and state if you know whose signature are the words "Frank Davies" appearing twice on page 4 of said letter being in each case immediately preceded by the words "William W. Bierce Limited by".

XV.

If your answer to the last interrogatory is to the effect that the said words "Frank Davies" are the signature of the said Frank Davies hereinabove referred to, state in detail what was done after February 21st, 1900, by William
177 W. Bierce Limited in regard to the railroad equipment mentioned in the said letter.

XVI.

If in answer to the last preceding interrogatory you have mentioned Harry T. Gilbert as acting for William W. Bierce Limited in connection with this matter, state whether the authority of the said Harry T. Gilbert to act for William W. Bierce Limited was written or oral?

XVII.

If your answer to the last preceding interrogatory you have stated that the authority of the said Harry T. Gilbert was in writing, state if the said authority in writing is in existence?

XVIII.

If your answer to the last preceding interrogatory is in the affirmative, please produce said written authority, identify it and attach it to your answer as an exhibit?

XIX.

If your answer to interrogatory XVII is in the negative, please state whether you have a copy of said written authority?

XX.

If your answer to the last preceding interrogatory is in the affirmative, please produce the said copy, identify it and attach it to your answers as an exhibit?

XXI.

If your answer to interrogatory XIX is in the negative, state if you know what the cintents of said written authority were?

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XXII.

If your answer to interrogatory XVI is to the effect that the authority given to the said Harry T. Gilbert was oral, please state what that authority was?

XXIII.

Do you know the handwriting of the said Harry T. Gilbert?

XXIV.

If your answer to the last preceding interrogatory is in the affirmative, please examine the letter dated Honolulu March 13th 1901 addressed to the Kona Sugar Company, Limited, Honolulu H. I., which is attached to these interrogatories as exhibit "B" and hereby made a part of them, and state if you know whose signature are the words "Harry T. Gilbert" appearing twice on the second page of the said exhibit being in each case immediately preceded by the words "W. W. Bierce Limited by"?

XXV.

State, if you know, what if anything was done by William W. Bierce, Limited, in regard to the said rails, locomotives, cars, scales and other materials referred to in said letter of March 13th 1901, after the execution by them of the said letter referred to in the immediately preceding question?

XXVI.

State if you know, what, if anything, was done by the said Kona Sugar Company, Limited, in regard to the said materials after the said offer of March 13th, 1901?

XXVII.

If in answer to the two last preceding interrogatories you have mentioned any correspondence between the Kona
179 Sugar Company Limited and William W. Bierce Limited relative to the subject matter of the last preceding interrogatory, please produce the same, identify it and attach them to your answer as exhibits?

XXVIII.

State if you know whether or not William W. Bierce Limited ever received a note for $37,044.53, purporting to be the note mentioned in the said letter of March 13th, 1901, referred to in interrogatories 23, 24, 25 and 26?

XXIX.

If your answer to the last preceding interrogatory is in the affirmative, state whether or not you have the said note in your possession at the present time?

XXX.

If your answer to the interrogatory is in the affirmative please produce the same, identify it and attach it to your answer as an exhibit.

XXXI.

Do you know the signature of W. W. Bierce?

XXXII.

If your answer to the last preceding interrogatory is in the affirmative, please examine the endorsements on the back of said note produced, identified and attached by you as an exhibit as aforesaid, and state if you know whose signature are the words "Wm. W. Bierce-Predt" written under the words "Wm. W. Bierce Limited"?

XXXIII.

Do you know the signature of W. W. Bouden?

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XXXIV.

If your answer to the last preceding interrogatory is in the affirmative, examine the endorsements on the back of the note already referred to, and state if you can, whose signature are the words "W. W. Bouden Secty & Treas" appearing twice on the back of said note.

XXXV.

State if you know whose signature are the words "C. Bierce V. Prest" appearing on the back of said note immediately under the words "Wm. W. Bierce Ltd."

XXXVI.

If your answer to interrogatory 23 is in the affirmative please examine the endorsements on the back of said note referred to, and state if you can whose signature are the words "Harry T. Gilbert" appearing thereon.

XXXVII.

If your answer to interrogatory 28 is in the affirmative, state whether the said note referred to in said interrogatory and answer thereto was paid when due?

XXXVIII.

If your answer to interrogatory 28 is in the affirmative and your answer to interrogatory 37 is in the negative, state what payments, if any, have at any time been made on said note?

XXXIX.

If your answers to the interrogatories 37 and 38 are substantially to the effect that he said note was not paid when due, and that no payments have at any time been made on said note by any person, state what, if anything, was done by William W. Bierce, Limited, after the non-payment of the said note when due?

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XL.

If in answer to the last preceding interrogatory you have stated among other things that during the middle and latter parts of the year 1902, you were informed by your attorneys in Honolulu, Kinney, Ballou & McClanahan, that they, acting as your attorneys, had given notice of a claim of lien and had subsequently instituted an action on said lien against the rails, engines, cars and other railroad equipment referred to in the preceding interrogatories, which were at that time in the possession of the Kona Sugar Company, Limited. State what information or belief, if any, William W. Bierce Limited had at the time they were notified that a lien had been filed in regard to the rights of the Kona Sugar Company Limited in and to the land over which the plantation railroad ran?

XLI.

State what information or belief, if any, William W. Bierce had at the time they were notified that an action had been begun on said lien against the railroad equipment, etc., referred to in the last preceding interrogatory?

XLII.

If in answer to the two last preceding interrogatories you have stated that at the times therein referred to William W. Bierce understood and believed that the plantation railroad of the Kona Sugar Company Limited, which railroad was made up by the rails, engines, cars, etc., referred to in these interrogatories ran over land belonging to the Kona Sugar Company Limited state what, if any, understanding or belief William W. Bierce has upon the subject at the present time?

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XLIII.

If your answer to the last preceding interrogatory is substantially to the effect that at the present time the understanding and belief of William W. Bierce is that the said railroad runs practically wholly on land of which the Kona Sugar Company Limited is not now and never was the owner either in fee simple or by leasehold, but simply at most a bare lessee state when William W. Bierce Limited has received information to this effect.

XLIV.

If your answer to the last preceding interrogatory is substantially to the effect that William W. Bierce Limited has received such information about the 1st of January A. D. 1903, state what, if anything, they did upon receiving such information.

183 IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT.

Territory of Hawaii.

At Chambers. In Equity.

R. W. McChesney, J. M. McChesney & F. W. McChesney, carrying on business under the name of M. W. McChesney & Sons,
Plaintiffs.
vs.
The Kona Sugar Company, Limited, a corporation, and the First American Savings and Trust Company of Hawaii Limited, a corporation,
Defendants.
William W. Bierce Limited et al,
Intervenors.

Interrogatories of William W. Bierce Limited to Be Propounded to Harry T. Gilbert.

1.

What is your name?

2.

What is your business at the present time?

3.

What was your business in the year 1900?

4.

If your answer to the last preceding interrogatory is that in the year 1900 you were acting as the agent and repre-
184 sentative of William W. Bierce Limited, please examine the interrogatories Nos. 15 to 24 inclusive and 36 propounded to Columbus Bierce by William W. Bierce in the above entitled cause, and also the respective answers to the said interrogatories by Columbus Bierce, and state if you know who is the Harry T. Gilbert referred to therein.

5

If your answer to Interrogatory 3 is that in the year 1900 you were acting as the representative of William W. Bierce Limited state in what portion of the United States, if any, you were during the middle and latter portion of the year 1900.

6.

If your answer to the last preceding interrogatory is to the effect that you were in San Francisco, state in what capacity you were there.

7

State in detail what, if anything, you did in San Francisco in connection with certain railroad equipment that William W. Bierce Limited had shipped to the Hawaiian Islands at the request of the Kona Sugar Company Limited.

8.

State when you left San Francisco.

9.

State to where you went from San Francisco?

10.

If your answer to the last preceding interrogatory is to the effect that after leaving San Francisco you went to Honolulu Hawaiian Islands, state on what business you went there.

185 11.

If in answer to the last preceding interrogatory you have stated that you went to Honolulu on business in connection with certain railroad equipment shipped to the Hawaiian Islands by William W. Bierce, Limited, state where, if anywhere, you found the said railroad equipment after your arrival in Honolulu.

12.

State in whose possession the said railroad equipment was?

13.

State in detail what transactions, if any, you had with the Kona Sugar Company, Limited, with reference to this railroad equipment.

14.

State what conversations, if any, you had with the Kona Sugar Company, Limited in reference to this railroad equipment.

15.

Please examine exhibit "B" attached to Interrogatory 24 of the interrogatories of William W. Bierce Limited to be propounded to Columbus Bierce in the above entitled cause, and state if you can, whether or not you ever saw before the said document attached to the said interrogatories as exhibit "B". The document referred to being a typewritten letter dated March 13th 1901, addressed to the Kona Sugar Company Limited and purporting to be signed by William W. Bierce Limited by H. T. Gilbert.

16.

State whether or not the words "H. T. Gilbert" appearing
twice on the second page of said exhibit "B" referred
186 to in the last preceding interrogatory immediately under
the words W. W. Bierce Ltd" are your signature.

17.

Have you ever seen J. M. McChesney of Honolulu, Hawaiian Islands, write?

18.

If your answer to the last preceding interrogatory is in the affirmative, please examine the words "J. M. McChesney" on the said page two of the said Exhibit "B" referred to in interrogatories 15 and 16 and state if you know whether that is his signature?

19.

Have you ever seen F. W. McChesney of Honolulu, Hawaiian Islands, write?

20.

If your answer to the last preceding interrogatory is in the affirmative, please examine the signature of F. W. McChesney on the said second page of the said exhibit "B" referred to in interrogatory 15, 16, 17 and 18, and state if you know whether or not that is his signature?

21.

Please examine the exhibits attached to the answers of Columbus Bierce to the interrogatories propounded to him in the above entitled cause by William W. Bierce Limited: State if you can, whether or not you ever saw before the document attached to the said answers as an exhibit to answer 30 of said interrogatory. The said answer being in
answer to interrogatory 30 of the said interrogatories,
187 and the document referred to being in the form of a
promissory note for $37,044.53, dated Honolulu March 13th, 1901 and purporting to be signed by The Kona Sugar Company, Limited by its president J. M. McChesney and by its treasurer F. W. McChesney, and the said note purporting to be endorsed to the order of Harry T. Gilbert by William W. Bierce Limited, by Wm. W. Bierce, President and W. W. Bouden, Secretary and Treasurer and purporting to be endorsed in blank by Harry T. Gilbert and purporting to be endorsed in blank Wm. W. Bierce Limited by W. W. Bouden, Secretary and Treasurer and by Columbus Bierce Vice-President.

22.

State if you know whether or not the words "Harry T. Gilbert" appearing on the back of said exhibit referred to in the last preceding interrogatory immediately under the words "by Wm. W. Bierce predt" are your signature.

23.

If your answer to interrogatory 17 is in the affirmative please examine the words "J. M. McChesney" on the face of the exhibit referred to in interrogatory 21, the said words being at the bottom of the said exhibit and immediately under the words "By its president", and state if you know whether or not the said words "J. M. McChesney" are the signature of J. M. McChesney" referred to in interrogatory 17.

24.

If your answer to interrogatory 19 has been in the affirmative please examine the words "F. W. McChesney" upon the face of the exhibit referred to in the last preceding interrogatory in the letter, left corner thereof immediately
188 under the words "By its trasurer", and state if you can,
whether or not the words F. W. McChesney are the signature of the said F. W. McChesney referred to in interrogatory 19.

25.

State if you know, what, if anything, was done with the railroad equipment already referred to after March 13th 1901.

26.

If your answer to the last preceding interrogatory has been among other things to the effect that it was delivered to the Kona Sugar Company, Limited, state if you know, in detail, of the articles of railroad equipment with those delivered.

189 IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT.

Territory of Hawaii.

At Chambers. In Equity.

R. W. McChesney, J. M. McChesney & F. W. McChesney, carrying on business under the name of M. W. McChesney & Sons,
Plaintiffs.
vs.
The Kona Sugar Company, Limited, a corporation, and the First American Savings and Trust Company of Hawaii, Limited, a corporation,
Defendants.
William W. Bierce, Limited, et al.,
Intervenors.

Depositions of Columbus Bierce and Harry T. Gilbert.

190 The Depositions of Columbus Bierce, of the City of Chicago in the County of Cook and State of Illinois, and Harry T. Gilbert, of the City of New Orleans, in the Parish of Orleans and State of Louisiana, witnesses of lawful age, produced, sworn and examined upon their respective corporeal oaths, on the 26th day of September, A. D. 1903, at Room 1412 Monadnock Block, in the City of Chicago, in the County of Cook and State of Illinois, by me, Ralph C. Shaw, a commissioner duly appointed by a dedimus potestatem or commission issued out of the Clerk's Office of the Supreme Court of the Territory of Hawaii, bearing teste in the name of the Hon. W. S. Edings, Judge of the Circuit Court of the Third Judicial Circuit, in the Territory of Hawaii, with the seal of said Court affixed thereto, and to me directed as such commissioner for the examination of the said Columbus Bierce and Harry T. Gilbert, as witnesses in a certain suit and matter in controversy, now pending and undetermined in the said Circuit Court, wherein R. W. McChesney, J. M. McChesney and F. W. McChesney, carrying on business under the name of M. W. McChesney & Sons, are plaintiffs, and Kona Sugar Company, Limited, et al. are defendants, and Kapiolani Estate Limited, et al., are intervenors, upon the written interrogatories of William W. Bierce, Limited, which

were attached to, or enclosed with, the said commission, as well as upon the cross-interrogatories if any, of M. W. McChesney & Sons, The Kona Sugar Company Limited, The First American Savings & Trust Company of Hawaii, The Kapiolani Estate, Limited, L. M. Whitehouse, James A. Hopper Company, Limited, John D. Paris, Hannah Paris, Eliza Roy, W. H. Shipman, J. D. Johnson and W. H. Johnson, and upon the re-direct-interrogatories, if any, of the said William W. Bierce, Limited, and upon none others. The said Columbus Bierce and Harry T. Gilbert, being first duly severally sworn by me as such Commissioner as witnesses in the said cause previous to the com-

Ralph C. Shaw
Com'r.

191 mencement of their examination to testify the truth as well on the part of the plaintiffs and the defendants as the intervenors, in relation to the matters in controversy between the said intervenor, William W. Bierce, Limited, and the said Plaintiffs, defendants and other intervenors, so far as they, the said witnesses, should be interrogated, testified and deposed as follows.

Ralph C. Shaw
Com'r.

192 Interrogatories of William W. Bierce Limited propounded to the said COLUMBUS BIERCE, a witness produced and sworn as aforesaid on the part of the said William W. Bierce Limited, and his answers thereto as follows:

Interrogatory 1st. What is your name?

Answer to Interrogatory 1st. My name is Columbus Bierce.

Interrogatory 2nd. What office, if any, do you hold in the corporation William W. Bierce, Limited?

Answer to Interrogatory 2nd. I hold the office of vice President in the corporation William W. Bierce Limited.

Interrogatory 3. If your answer to the last preceding interrogatory is that you hold the office of Vice President, state how long you have held that office.

Answer to Interrogatory 3rd. I have held the office of Vice President of William W. Bierce Limited continuously from December 23rd, 1899, until the present time and am still Vice President of the Company.

Interrogatory 4th. State if you know whether William W.

Bierce Limited ever had any dealings with the Kona Sugar company Limited, a corporation, of Hawaii, relative to certain rails, engines, cars and other railroad equipment.

Answer to Interrogatory 4th. Yes, William W. Bierce limited have had dealings with the Kona Sugar Company Limited, a corporation, of Hawaii, relative to certain rails, engines, cars and other railroad equipment.

Interrogatory 5th. If your answer to the last preceding interrogatory is in the affirmative, state if you know when and how these negotiations began and what was done thereunder.

Answer to Interrogatory 5th. Either in December of 1899 or in January, 1900, we sent our representative, Mr. Frank Davies, to the Hawaiian Islands, for the purpose of soliciting business and making contracts in behalf of William W. Bierce Limited. While he was there, he entered into negotiations with the officers and representatives of the Kona Sugar
193 Company Limited, a corporation of Hawaii, for the sale

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and delivery to the Kona Sugar Company Limited by William W. Bierce Limited of certain rails, engines, cars and other railroad equipment for the plantation railroad of the Kona Sugar Company Limited, and in behalf of William W. Bierce Limited entered into a written contract bearing date February 21st, 1900, with the Kona Sugar Company Limited, for the sale and delivery to the latter of certain rails, engines, cars and other railroad equipment, which, together with the contract in question, are more particularly described and set forth in my answers to the 13th, 14th and 15th interrogatories of this my deposition.

Interrogatory 6th. If in answer to the last preceding interrogatory you have stated, among other things, that one Frank Davies was sent to Honolulu to act as the representative of William W. Bierce, Limited, in regard to these negotiations, state whether the authority of the said Frank Davies was written or oral.

Answer to Interrogatory 6th. The authority of Mr. Frank Davies was both written and oral.

Interrogatory 7th. If in answer to the last preceding interrogatory you have stated that his authority was written, please state if the said power given to him is in existence.

Answer to Interrogatory 7th. I cannot state whether the original written authority or power to act for William W.

Bierce Limited, given to Mr. Frank Davies, is at present in existence or not. I do not remember ever having seen it after it was given to him. We have made diligent search and inquiry among our files and papers and diligent inquiry of Mr. Davies for the purpose of finding and producing the original instrument, but neither we not Mr. Davies have been able to find it, and it is either lost or destroyed.

Interrogatory 8th. If your answer to the last preced-
194 ing interrogatory is in the affirmative, please produce,
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identify and attached the said power to your answer as an exhibit thereto.

Answer to Interrogatory 8th. As stated in my answer to the last preceding interrogatory, and for the reasons therein stated, I cannot produce or attach to my deposition the original power.

Interrogatory 9th. If your answer to Interrogatory 7th is in the negative, please state whether you have a copy of said written power.

Answer to Interrogatory 9th. Yes, we have a correct and true copy of the written power in question given to Mr. Davies.

Interrogatory 10th. If your answer to the last preceding interrogatory is in the affirmative, please produce, identify and attach said copy to your answer as an exhibit.

Answer to Interrogatory 10th. I herewith produce a copy of the power granted to Mr. Frank Davies and identify it by marking it "Exhibit Z," and hereby attach it to may answer as "Exhibit Z."

Interrogatory 11th. If your answer to question 9th is in the negative, state if you know the contents of said written authority.

To said Interrogatory 11th. no answer was given.

Interrogatory 12th. If your answer to question 6th is that the authority given to the said Frank Davies was oral, please state what the authority covered.

Answer to Interrogatory 12th. In a conversation between my brother, William W. Bierce, President of the Company, Mr. Frank Davies and myself, on the eve of Mr. Davies' departure for Honolulu, we said to Mr. Davies that it was our strong desire to have him visit the Islands with a view to getting as much business as it was possible for him to secure; that we were highly desirous of getting all the business that

was being offered at that time in the islands; that our facil-

was being offered at that time in the islands; that our fa-
195 cilities were excellent for furnishing rails, cane cars and

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railroad equipment and that we thought our prices would be sufficiently low to enable him to make large and favorable contracts. With this end in view we told him to visit all the sugar plantations and the various people who might be in the market for the class and character of goods that we were handling, with all of which Mr. Davies was previously familiar, and we told him fully upon what price and upon what terms we would make sales of these goods in the islands, and told him to proceed thither at once, which he did. In fact, the oral authority which we gave to Mr. Davies in that conversation, and possibly in previous conversations on the same subject, was a great deal broader and more comprehensive than the written authority which we gave to him at the time, and a copy of which I have attached to my deposition as "Exhibit Z," and included all the authority conferred upon him by that written instrument.

Interrogatory 13th. Do you know the handwriting of the Frank Davies referred to in the preceding questions and answers?

Answer to Interrogatory 13th. Yes, I do know the handwriting of Frank Davies referred to in the preceding interrogatories and my answers thereto, from having frequently seen him write and sign his name.

Interrogatory 14th. If your answer to the last preceding interrogatory is in the affirmative, please examine the letter dated Honolulu February 21st, 1900, addressed to the Kona Sugar Company Limited, which is attached to these interrogatories and made a part hereof, and marked "Exhibit A," and state if you know whose signature are the words "Frank Davies," appearing twice on page 4 of said letter, being in each case immediately preceded by the words "William W. Bierce Limited by."

Answer to Interrogatory 14th. I have examined the letter dated Honolulu, February 21st, 1900, addressed to the
Kona Sugar Company Limited, which is attached to these
196 interrogatories and made a part thereof and marked

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"Exhibit A", and have particularly examined the signatures thereto and know that the words "Frank Davies" appearing twice on page 4 of said letter, being in each case immediately preceded by the words "William W. Bierce Limited by" are the genuine signature of the Frank Davies referred to in the preceding interrogatories and my answers thereto.

Interrogatory 15th. If your answer to the last interrogatory is to the effect that the said words "Frank Davies" are the signature of the said Frank Davies hereinabove referred to, state in detail what was done after February 21st, 1900, by William W. Bierce Limited, in regard to the railroad equipment mentioned in the said letter.

Answer to Interrogatory 15th. After February 21st, 1900, on Mr. Davies' return to our New Orleans office, he made a full and favorable report to us of the negotiations had by him in the Islands with the Kona Sugar Company Limited, and of the sale made in question to the latter, and delivered over to us the original letter bearing, the same as it does now, the acceptance of the Kona Sugar Company Limited, by M. W. McChesney & Sons, Agent, dated February 22nd, 1900, and William W. Bierce Limited thereupon proceeding at once to purchase and have manufactured and to assemble for shipment all the various items of railroad rails, engines, cane cars and other railroad equipment mentioned and described in said letter of February 21st, 1900, and the acceptance thereof, and proceeded to ship and did ship to the Kona Sugar Company Limited, Honolulu, Hawaiian Islands, the major portion of said railroad rails and both the engines and all the cars and other railroad equipment therein men-
197 tioned. The only portion of the goods in question not

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so shipped consisted of about 188 tons of railroad rails, of the value of about $9,532, at the prices specified in the agreement of sale in question, which was not shipped on account of the failure of the Kona Sugar Company Limited to pay its promissory note at maturity, which note I will refer to later. I was actively in charge of the New Orleans office of William W. Bierce Limited, as, Vice President of the Company, during the entire period covering all the transactions mentioned in my answer to the interrogatories contained in this my deposition, both preceding and following this answer, and fully remember the entire transaction in question between William W. Bierce Limited and the Kona Sugar Company Limited. According to the terms of the contract we made shipments making sight draft upon the Kona Sugar Company Limited, together with bills of lading attached thereto, and upon their failure to pay the drafts promptly at maturity we then sent our Mr. Harry T. Gilbert to San Francisco to confer with Mr. McChesney, the President of the Kona Sugar Company Limited. Upon failure on the part of the Kona Sugar Company Limited to pay the drafts, we ordered Mr. Gilbert to proceed to Honolulu, which he did, and after conferring with the Kona Sugar Company Limited there he succeeded in getting a cash payment of $10,000 and a note for the balance. After Mr. Harry T. Gilbert returned, bringing with him the note and conditional sale agreement of March 13th, 1901, we deposited the note in the regular course of business with our bank for collection and upon its maturity the note was promptly presented for payment, and the same not having been paid was protested for non-payment; whereupon we again sent our Mr. Gilbert to San Francisco and Honolulu for the purpose of collecting this money, and failing in his endeavor the matter was placed by Mr. Harry T. Gilbert in the hands of our attorneys, Messrs. Kinney, Ballou & McClanahan.

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198 Interrogatory 16th. If, in answer to the last preceding interrogatory you have mentioned Harry T. Gilbert as acting for William W. Bierce, Limited, in connection with this matter, state whether the authority of the said Harry T. Gilbert to act for William W. Bierce Limited was written or oral.

Answer to Interrogatory 16th. Having mentioned the name of Harry T. Gilbert as acting for William W. Bierce Limited, in connection with this matter, I desire to state that the authority given to Harry T. Gilbert was both written and oral.

Interrogatory 17th. If, in your answer to the last preceding interrogatory, you have stated that the authority of the said Harry T. Gilbert was in writing, state if the said authority in writing is in existence.

Answer to Interrogatory 17th. Yes. Said original written authority is now in existence.

Interrogatory 18th. If your answer to the last preceding interrogatory is in the affirmative, please produce said written authority, identify it and attach it to your answer as an exhibit. Ans. to Interrogatory 18th. I herewith produce said original written authority to Mr. Harry T. Gilbert and attach same to this my answer, marked and identified as "Exhibit Y."

Interrogatory 19th. If your answer to Interrogatory 17th is in the negative please state whether you have a copy of said written authority.

No answer.

Interrogatory 20th. If your answer to the last preceding interrogatory is in the affirmative, please produce the

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198½ said copy, identify it and attach it to your answers as an exhibit.

No answer.

Interrogatory 21st. If your answer to Interrogatory 19th is in the negative state if you know what the contents of said written authority were.

No answer.

Interrogatory 22nd. If your answer to Interrogatory 16th is to the effect that the authority given to the said Harry T. Gilbert was oral, please state what the authority was.

Answer to Interrogatory 22nd. The oral authority given to Harry T. Gilbert by the President and Vice President of William W. Bierce Limited was in substance to proceed to San Francisco and Honolulu, with a view to effecting a settlement with the Kona Sugar Company Limited. We told him to take any and all such steps as in his discretion he might deem necessary or proper, for the purpose of collecting the money due us on the promissory note in question, and to make any disposition of the note and collateral which he might deem proper for the purpose. The scope of the authority so given to him verbally was as comprehensive as possible, and included all the authority conferred upon him by the written power attached to my deposition as "Exhibit Y", which was given to him as evidence of his authority to present to any persons with whom he might find it necessary to deal, in making such settlement and in collecting our money or negotiating the note and collateral for that purpose.

Interrogatory 23rd. Do you know the handwriting of

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199 the said Harry T. Gilbert.

Answer to Interrogatory 23rd. Yes. I do know the handwriting of Harry T. Gilbert, from having frequently seen him write and sign his name.

Interrogatory 24th. If your answer to the last preceding interrogatory is in the affirmative, please examine the letter dated Honolulu, March 13th, 1901, addressed to the Kona Sugar Company, Limited, Honolulu, H. I., which is attached to these interrogatories as "Exhibit B," and hereby made a part of them, and state if you know whose signature are the words "Harry T. Gilbert," appearing twice on the second page of the said Exhibit B, being in each case immediately preceded by the words "W. W. Bierce Limited by."

Ans. to Interrogatory 24th. I have examined the letter dated Honolulu, March 13th, 1901, addressed to the Kona Sugar Company Limited, Honolulu, H. I., which is attached to these interrogatories as "Exhibit B," and know that the words "Harry T. Gilbert" appearing twice on the second page of said "Exhibit B," being in each case immediately preceded by the words W. W. Bierce Limited by" are the genuine signature of the Harry T. Gilbert referred to in the preceding interrogatories and answers.

Interrogatory 25th. State if you know what, if anything, was done by William W. Bierce Limited, in regard to the said rails, locomotives, cars, scales and other materials referred to in said letter of March 13th, 1901, after the execution by them of the said letter referred to in the immediately preceding questions.

Answer to Interrogatory 25th. After the execution of said letter above referred to, the rails, locomotives, cars, scales and other materials referred to in said letter of

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200 March 13th, 1901, were turned over and delivered to the Kona Sugar Company, Limited, by William W. Bierce Limited, to be held by them as the property of William W. Bierce Limited, until the full payment of the note in question. Payment having been refused upon the note, we subsequently sent Mr. Gilbert to San Francisco and Honolulu for the purpose of collecting the money or recovering back the property which we had turned over to the Kona Sugar Company, Limited, under the agreement of March 13th. Failing in both, Mr. Gilbert placed the matter in the hands of our attorneys, Messrs. Kinney, Ballou & McClanahan, together with the note and bonds, for the purpose of collecting the money or recovering back the goods, neither of which has been done as yet. No payment has ever been made to William W. Bierce, Limited on the note in question, which is

still held by William W. Bierce, Limited, together with the bonds received as collateral thereto. All efforts to collect anything on this note having failed and the collateral having apparently become worthless, William W. Bierce, Limited, about January 1st, 1903, instructed its attorneys, Messrs. Kinney, Ballou & McClanahan, to proceed by all lawful means to recover back for William W. Bierce, Limited the possession of the goods in question, conditionally delivered to the Kona Sugar Company Limited as the property of William W. Bierce, Limited.

Interrogatory 26th. State if you know what, if anything, was done by the said Kona Sugar Company, Limited, in regard to the said material, after the said offer of March 13th, 1901.

Answer to Interrogatory 26th. The Kona Sugar Company Limited, after the offer and acceptance of the offer dated Honolulu, H. I. March 13th, 1901, took over the property and used the same, holding it as the property of William W.

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201 Bierce, Limited until fully paid for.

Interrogatory 27th. If, in answer to the two last preceding interrogatories, you have mentioned any correspondence between the Kona Sugar Company Limited and William W. Bierce Limited, relative to the subject matter of the last preceding interrogatory, please produce the same, identify it and attach them to your answer as exhibits.

No answer.

Interrogatory 28th. State if you know whether or not William W. Bierce Limited ever received a note for $37,044.53, purporting to be the note mentioned in the said letter of March 13th, 1901, referred to in interrogatories 23, 24, 25 and 26.

Answer to Interrogatory 28th. Yes. William W. Bierce Limited did receive a note for $37,044.53, purporting to be the note mentioned in the said letter of March 13th, 1901, referred to in interrogatories 23, 24, 25 and 26.

Interrogatory 29th. If your answer to the last preceding interrogatory is in the affirmative, state whether or not you have the said note in your possession at the present time.

Answer to Interrogatory 29th. The said note above referred to is still in the possession of William W. Bierce Limited.

Interrogatory 30th. If your answer to the interrogatory is in the affirmative, please produce the same, identify it and attach it to your answer as an exhibit.

Answer to Interrogatory 30th. I hereby produce the said note above referred to, identify it by marking it "Exhibit W," and attach it to this my answer as "Exhibit W."

Interrogatory 31st. Do you know the signature of Wm. W. Bierce?

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202 Answer to Interrogatory 31st. Yes. I do know the signature of Wm. W. Bierce from having frequently seen him write and sign his name.

Interrogatory 32nd. If your answer to the last preceding interrogatory is in the affirmative, please examine the endorsement on the back of said note, produced, identified and attached by you as an exhibit as aforesaid, and state if you know whose signature are the words Wm. W. Bierce Predt." written under the words "Wm. W. Bierce Limited."

Answer to Interrogatory 32nd. I have examined the endorsements on the back of the note produced, identified and attached by me as "Exhibit W" as aforesaid, and know that the words "Wm. W. Bierce Predt." written under the words "William W. Bierce Limited by" is the genuine signature of Wm. W. Bierce, President of William W. Bierce Limited.

Interrogatory 33rd. Do you know the signature of W. W. Bouden?

Answer to Interrogatory 33rd. Yes, I do know the signature of W. W. Bouden, from having frequently seen him sign and write his name.

Interrogatory 34th. If your answer to the last preceding interrogatory is in the affirmative, examine the endorsements on the back of the note already referred to and state if you can whose signature are the words "W. W. Bouden, Secty & Treas," appearing twice on the back of said note.

Answer to Interrogatory 34th. I have examined the endorsements on the back of the note already referred to and know that the words "W. W. Bouden, Secty & Treas.," appearing twice on the back of said note are the genuine
203 signature of W. W. Bouden, Secretary and Treasurer of

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William W. Bierce Limited.

Interrogatory 35th. State if you know whose signature arenthe words "C. Bierce, V. Prest." appearing on the back of said note immediately under the words "Wm. W. Bierce Ltd."

Answer to Interrogatory 35th. I have examined the words "C. Bierce, V. Prest.," appearing on the back of said note above referred to, immediately under the words "Wm. W. Bierce Ltd. by," and the same are my genuine signature as Vice President of William W. Bierce Limited.

Interrogatory 36th. If your answer tomInterrogatory 23rd is in the affirmative, please examine the endorsements on the back of said note referred to, and state if you can whose signature are the words "Harry T. Gilbert," appearing thereon.

Answer to Interrogatory 36th. The words "Harry T. Gilbert" appearing on the back of the note already referred to, are the genuine signature, of the said Harry T. Gilbert referred to in the preceding interrogatories and my answers thereto.

Interrogatory 37th. If your answer to Interrogatory 28th is in the affirmative, state whether the said note referred to in said interrogatory and answer thereto was paid when due.

Answer to Interrogatory 37th. The said note above referred to was not paid when due.

Interrogatory 38th. If your answer to Interrogatory 28th is in the affirmative and your answer to Interrogatory 37th is in the negative, state what payments, if any, have at any

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204 time has been made on said note.

Answer to Interrogatory 38th. No payment whatsoever has been made, at any time, upon said note.

Interrogatory 39th. If your answer tominterrogatories 37th and 38th are substantially to the effect that the said note was not paid when due, and that payments have, at any time, been made on said note by any person, state what, if anything, was done by William W. Bierce Limited, after the non-payment of the said note when due.

Answer to Interrogatory 39th. After the said note matured and was not paid upon presentation, William W. Bierce Limited immediately caused the same to be promptly protested for non-payment, and as stated in my answer to preceding interrogatories of this my deposition, sent the said Harry T. Gilbert to Honolulu as its representative, for the purpose of making a settlement with the Kona Sugar Company Limited, by negotiating the note or collateral or otherwise collecting the money due on the note. Mr. Gilbert having failed to make such settlement or to collect anything on the note, turned over the note and collateral and agreements referred to in my testimony to Messrs. Kinney, Ballou & McClanahan, our attorneys at Honolulu, for collection of the money due us, or the recovery back of the specific property or goods in question delivered by us to the Kona Sugar Company Limited, by enforcing any and all legal remedies against the latter for this purpose, to which we were entitled under our agreement with them. Whenever I speak of "We" "our" or "us," in my deposition, I mean William W. Bierce Limited. Before any procedings had been taken in our behalf, by Messrs. Kinney, Ballou & McClanahan, against the Kona Sugar

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205 Company Limited, we were advised by them that a suit had been brought by M. W. McChesney and other stockholders against the Kona Sugar Company Limited and others, and a receiver appointed therein, for the property of the Kona Sugar Company Limited, which proceeding had operated to forestall substantially any action we could take for the collection of our money or the recovery back of our property otherwise than by intervening in said receivership suit, which I understand to be the same suit in which this my deposition is being taken. In the middle or latter part of the year 1902, we were informed by our attorneys in Honolulu, Messrs. Kinney, Ballou & McClanahan, that they, acting as our attorneys, had given notice of a claim of mechanic's lien against the railroad in question, the plantation railroad of the Kona Sugar Company Limited, and had subsequently instituted an action for enforcement of said lien against the railroad, engines, cars and other railroad equipment referred to in the preceding interrogatories and my answers thereto, which were then in the possession of the Kona Sugar Company Limited. In our correspondence with and instructions to Messrs. Kinney, Ballou & McClanahan, we left the matter wholly in their discretion, believing that they who were near the scene of action were better advised of all the conditions and circumstances affecting the property and our rights than we could possibly be at this great distance, to take such proceedings in our behalf for the recovery of our money or our property from the Kona Sugar Company Limited, as they might deem advisable, under all the circumstances.

Interrogatory 40th. If in answer to the last preceding in-

terrogatory you have stated, among other things, that
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206 during the middle and latter part of the year 1902 you were informed by your attorneys in Honolulu, Messrs. Kinney, Ballou & McClanahan, that they, acting as your attorneys, had given notice of a claim of lien, and had subsequently instituted an action on said lien against the rails, engines, cars and other railroad equipment referred to in the preceding interrogatories, which were at that time in the possession of the Kona Sugar Company Limited, state what information or belief, if any, William W. Bierce, Limited, had, at the time they were notified that a lien had been filed in regard to the rights of the Kona Sugar Company Limited, in and to the land over which the plaintation railroad ran.

Answer to Interrogatory 40th. At the time William W. Bierce Limited were informed by Messrs. Kinney, Ballou & McClanahan that they had filed a mechanic's lien claim in our behalf, as stated in my answer to the last preceding interrogatory, we had considerable information which seemed to point conclusively to the fact that the Kona Sugar Company Limited owned the land on which the rails, cars, locomotives, scales and other materials supplied by us, as stated in my answer to the foregoing interrogatory, had been installed and used in operating the plantation railroad of the Kona Sugar Company Limited. This information consisted of statements, made to us verbally by Mr. Frank Davies and by Mr. Harry T. Gilbert, after they had visited the Islands as our representatives, to the effect that the goods in question were to be used in building constructing and operating the railroad of the Kona Sugar Company Limited, on the Kona plantation of the Company, and later that the same had been so used and that the Kona Sugar Company Limited was operating this railroad on and as an essential part of a large sugar plantation located in Kona District, in the island of Hawaii, of which plantation it was the owner. We received like
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207 information from time to time from Messrs. Kinney, Ballou & McClanahan, and under the circumstances it was a reasonable and necessary inference on our part that the Kona Sugar Company Limited, either held the title in fee simple to the land on which the plantation railroad was con-

structed or held a long term written lease thereof, or had otherwise acquired a satisfactory title to the land in the shape of a written conveyance of right of way or equivalent rights and title by condemnation proceedings, which is a usual and familiar mode of acquiring title to land for use as a railroad right of way in all parts of the United States.

Interrogatory 41st. State what information or belief, if any, William W. Bierce, Limited had at the time they were notified that an action had been begun on said lien against the railroad equipment etc. referred to in the last preceding interrogatory.

Answer to Interrogatory 41st. At the time William W. Bierce Limited were informed that an action had been begun to enforce such mechanic's lien, in its behalf, against the railroad and railroad equipment referred to in the last preceding interrogatory and my answer thereto, they had the same information and belief as mentioned in my answer to the last preceding interrogatory.

Interrogatory 42nd. If in answer to the two last preceding interrogatories you have stated that at the time therein referred to William W. Bierce understood and believed that the plantation railroad of the Kona Sugar Company Limited, which railroad was made up by the rails, engines, cars, etc. referred to in these interrogatories, ran over lands belonging to the Kona Sugar Company Limited, state what,
208 if any, understanding or belief William W. Bierce has
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upon that subject at the present time.

Answer to Interrogatory 42nd. Our understanding and belief that the plantation railroad in question of the Kona Sugar Company Limited was constructed upon land the title to which was held by the Kona Sugar Company Limited, existed until about the first of January, 1903, when our Chicago counsel, Mr. H. W. Prouty, upon his return from his trip to Honolulu, in connection with this case, told us that he had learned, while in Honolulu, that the Kona Sugar Company Limited held no title whatsoever and never had held title, in any form, to the land on which this plantation railroad was constructed, and over which it ran, and according to the best information we have been able to obtain, appeared to have been and still to be a trespasser thereon, in constructing and operating its railroad on the land, greatly to our astonishment and contrary to all the information we had pre-

viously received on the same subject. At about the same time, we were advised to the same effect by letters received in the usual course of mail in our office in Chicago, from our Honolulu counsel, Messrs. Kinney, Ballou & McClanahan. In the wildest flights of our imagination, we had never imagined that anybody other than an idiot or an insane man would attempt to build a railroad without title to or right of way over the land whereon the railroad was to be constructed, and as soon as our previous misinformation on this subject had been corrected by the information first received by us on about the first of January, 1903, from Mr. Prouty and from Messrs. Kinney, McClanahan & Bigelow in the manner as I have stated, that this identical thing had been done in the case
209 of the plantation railroad in question of the Kona Sugar

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Company Limited, viz: the improvident and insane construction and operation of its railroad on land to which it held no title and over which it never had any right of way whatsoever, we promptly instructed our Honolulu attorneys, Messrs. Kinney, McClanahan & Bigelow, to dismiss the suit brought and claim filed by them, for the purpose of enforcing the mechanic's lien on the railroad in question, for the balance of the contract price of the railroad equipment, to which I have previously referred in my testimony.

Interrogatory 43rd. If your answer to the last preceding interrogatory is substantially to the effect that at the present time the understanding and belief of William W. Bierce is that the said railroad runs practically wholly on land of which the Kona Sugar Company Limited is not now and never was the owner, either in fee simple or by leasehold, but simply at most as bare lessee, state when William W. Bierce Limited has received information to this effect.

Answer to Interrogatory 43rd. As stated in my answer to the last preceding interrogatory, William W. Bierce Limited first received information to the effect that the Kona Sugar Company Limited is not and never was the owner either in fee simple or by leasehold of the land over which the plantation railroad in question runs, and does not now hold and never has held any right of way, whatsoever over said land, on or about January 1st, 1903.

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210 Interrogatory 44th. If you answer to the last preceding interrogatory is substantially to the effect that William W. Bierce Limited has received such information about the first of January, A. D. 1903, state what if anything they did upon receiving such information.

Answer to Interrogatory 43rd. As stated in my answer to the 42nd interrogatory, as soon as William W. Bierce Limited received said information, on or about January 1st, 1903, they instructed their Honolulu attorneys, Messrs. Kinney, McClanahan & Bigelow, promptly to dismiss the suit previously brought by them, for the purpose of establishing a mechanic's or materialmen's lien upon the plantation railroad in question, for the unpaid balance of the contract price of the railroad equipment in question.

(Sig.) COLUMBUS BIERCE

Subscribed and sworn to before me this 26th day of September, 1903.

(Sig.) RALPH. C. SHAW
Commissioner.

211 EXHIBIT Z.

New Orleans, December 23, 1899.

The bearer, Mr. Frank Davies, has been duly appointed manager of the supply department of this corporation, and as such is authorized to enter into such contracts in the name of the corporation as in his judgment may inure to its benefit. Contracts so made by him, will be executed and signed "William W. Bierce, Limited, by William W. Bierce, President."

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212 EXHIBIT A.

Honolulu, Hawaiian Islands, February 21, 1900.

Kona Sugar Company,
Hawaiian Islands.

Gentlemen:—

For the sum of Forty-six ($46.40) Dollars and forty cents per ton of 2,240 pounds, we propose to furnish you with five hundred and fifty (550) tons of first quality steel "T" rails, weighing 35 lbs. to the yard. Also, to furnish sufficient complete joints to lay said rails for the sum total of Two Thousand Two Hundred and Eight-one ($2,281.00) Dollars, one complete joint being furnished for each rail; a complete joint consisting of two Angle Bars and four bolts. Also, for the sum of One Thousand Four Hundred and Forty ($1,440.00) Dollars to furnish sufficient 4-1/2″ x 1/2″ railroad track spikes to lay the 550 tons of rails with cross ties 2′ between centers.

The above prices are all freight prepaid to Honolulu, the Kona Sugar Company to reimburse Bierce for the insurance to be paid thereon.

—oOo—

We are also to furnish for the sum of Five Hundred and Forty-Five ($545.00) Dollars c. i. f. prepaid to Honolulu, ten sets of 35 pound split switch material complete with Plantation Target Stand, No. 6 Frog, 7′ 6″ split switch points, tie rods and slide plates; all designed for 3′ gauge of track.

—oOo—

Further, to furnish sixteen (16) cars, 28′ long, 7′ wide, end stakes 5′ high above floor line, for 3′ gauge of track as per the following specifications; price to be three hundred and forty ($340.00) Dollars per car c. i. f. prepaid to Honolulu/.

Lumber.

6 Longitudinal Sills, 4″ x 8″ Pine.
2 End Sills, 6″ x 10″ Oak; (planking 2″.)
2 Sub End Sills, 5-/1/2″ x 6″ Oak.
4 Draft Timbers, 2-1/2″ x 5-1/2″, Oak.
2 Cross Ties, 3″ x 5″ Oak.
6 End Stakes, 4″ x 5″ Oak, 5′ above floor line of car.
Filler blocks of oak.

Construction.

Sills will be mortised and tenoned to fit. Draft timbers will be bolted to both center sills, end sills and sub end sills, and be protected by cast iron mortise blocks. Cross ties will support car in center in conjunction with truss rods. End stakes will be mortised into end sills, and braced with angle or T iron for 3′ of their length. All wood to be coated with mineral paint; all iron work with asphaltum.

No floor planks, or side stakes shall be furnished.

Trucks.

Two Standard Trucks of the diamond type, provided each with four wheels, chilled charcoal iron, 24″ in diameter, 3-1/2″ tread, 275 lbs. each, mounted on axles 3-3/4″ diameter; journals 3-1/2″ diameter and having solid brass journal bearings. The top arch bar shall be 3″ x 1″, the inverted arch bar 3″ x 3/4″ and the tie bars 3″ x 5/8″, bent to shape and drilled 3/4″ column and journal box bolts. Journal boxes of cast iron provided with spring lid and hinged at the top. Bolster springs are to be in nests of four each, provided with plates top and botom of such sizes and dimensions to suit capacity of cars. Truck bolsters shall be I beams and channels—
Ralph C. Shaw,
Commissioner.

214 there shall be no woodwork of any kind in the truck proper. Body bolster shall be of steel.

Stake Pockets.

Side stake pockets, 24 in number (12 on each side of the car) of malleable iron for 3-1/2″ x 3-1/2″ stake at top, and diminishing to 3″ x 3″ at bottom. They shall be fastened to outside sill with 5/8″ U bolt, said U bolt passing through filler block to intermediate sills and fastened with nut on cast iron washer.

Ends.

The end stakes shall be tetoned into end sills and braced in front with T or angle iron for 3′ of the stake, and further braced with malleable iron bracket at end of car. Shall be bored fo 1/2″ bolts to hold planking in position. Shall be held in position at bottom each by two 5/8″ eye bolts, passing through bottom of stake and sill and fastened to intermediate sills.

Draw Gear.

Draw gear consists of cast iron drawheads, wrought iron follower plates, guides, etc., with draw springs and cast iron draw bar stops. Draw timbers are secured to center sills each with two 5/8″ bolts provided with cup washers on top and double nuts and wrought iron washers on bottom. Are further secured to buffer blocks (sub end sills) with four 5/8″ bolts. Drawbar carrier is made of 2-1/4″ x 3/8″, with ends gibbed to prevent draw timbers from spreading. Buffer block, or sub end sill is faced with plate of 4″ x 5/8″ iron.

Brake.

Car equipped with hand brake on each truck each with end wheel working on end sill.

Ralph C. Shaw,
Commissioner.

215 General.

Lumber entering into the manufacture of this car to be of good merchantable quality. Cars are to be shipped knocked down. All work to be done in a thorough and workmanlike manner. Car Guaranteed for Fifteen (15) Tons Carrying Capacity

—oOo—

The locomotives to be furnished are as follows:

One 9″ x 14″ Class "A," saddle tank locomotive of the Dickson Locomotive Works make, as per photograph attached, signed by both parties hereto for identification. Price of this locomotive to be Three Thousand Seven Hundred and Fifty Five ($3,755.00) Dollars, c. i. f. prepaid to Honolulu. This locomotive to be for 36″ gauge, marked "Kona Sugar Company," "No. 1", and to be fitted with steam brake.

—also—

One 10″ x 16,″ Class "M" back truck saddle tank locomotive, with six driving wheels, to be manufactured by the Dickson Locomotive Works, for 36″ gauge, to be fitted with steam brake and a duplicate in construction of the "Halawa," photo signed by both parties and attached hereto for identification. The approximate weight of this locomotive ready for service will be 38,000 pounds, 31,500 lbs. of which will be carried on the driving wheels. The driving wheels of this locomotive will be 33″ diameter, whilst those under the trucks will be 18″ diameter. The boiler pressure will be 150 lbs., water capacity 500 gallons, piston rod of machine steel, to have two sand boxes one forward and one back of the driving wheels; to be furnished with balloon shaped stack with spiral cone provided with steel wire netting. Cross head pump to be on right side and injector on left side. Fire box of steel. Price of this

Ralph C. Shaw,
Commissioner.

216 locomotive to be Five Thousand Four Hundred and Ninety-Five ($5,495.00) Dollars c. i. f. prepaid to Hono-

lulu. Locomotive to be marked "Kona Sugar Company, No. 2."

These locomotives wil each have two headlights, be constructed for use of either wood or coal as fuel; sold and guaranteed to be of best material, workmanship and design and equal in every degree to locomotive of same size and type built and manufactured by the Baldwin Locomotive Works.

Lastly, there is to be furnished one "Howe" Narrow Gauge Track Scale, to have a capacity of 25 tons, platform 30′ in length—foundation plan to be furnished by us—timber, work and foundation to be furnished by the Kona Sugar Company. Price $500.00 c. i. f. prepaid to Honolulu.

—oOo—

Deliveries.

Shipment of one-third of the rails, joints therefor, all the spikes, all the switches, four cars, the 9″ x 14″ locomotive, and the scales from works in four months after acceptance of this proposition; another one-third of the rails, together with the joints therefor, in five months after acceptance of this proposition; the balance of the rails and joints in six months after acceptance of this proposition; the balance of the cars (12) and the 10″ x 16″ locomotive may be shipped at any time to insure delivery at Honolulu December 1st to 15th after signing of contract.

—oOo—

Terms of Payment.

Cash upon presentation of demand draft attached to bill of lading, issued by initial line of railroad, showing material to have been shipped through to Honolulu. Insurance policy shall be transmitted as soon as possible after shipment is made, when it shall be determined just what vessel shall haul the material from port on mainland to Honolulu.

Ralph C. Shaw,
Commissioner.

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All monies are payable in New York or Chicago funds; the Kona Sugar Company to pay all items of exchange.

Twenty-Five Hundred ($2500.00) Dollars in paid up stock of the Kona Sugar Company shall be the first payment on account of the purchases herein proposed; this $2,500.00 to be covered by 5% deductions from the materials as shipped. Bierce agrees to deposit this $2,500.00 stock of the Kona Sugar Company with the Banking House of Bishop & Company in the City of Honolulu, as guarantee for the final consummation of the contract.

—oOo—

Note. Where reference herein is made to Honolulu as point of delivery—if vessels are available about time material is ready to ship sellers will make delivery at Kailua, District of Kona, in the Hawaiian Islands; but this is not to be construed as in any manner obligatory or binding.

—oOo—

This proposition is a confirmation of the verbal one made to the Directors of the Kona Sugar Company at their meeting Saturday, February 17th, 1900, and becomes binding on all parties when accepted by their agents, M. W. McChesney & Sons.

When duly accepted and made binding, said contract is amenable to the laws of the Hawaiian Islands in effect at date of signing.

Yours very truly,
WILLIAM W. BIERCE, LTD.,
(Signed) by FRANK DAVIES.

Ralph C. Shaw,
Commissioner.

218 Accepted in duplicate by

THE KONA SUGAR CO., LTD.,
By M. W. MCCHESNEY & SONS,
Agents.

this 22nd day of February, 1900.

Truss rods on cars 4 in number, 1″ dia upset ends 1 1/8″ Turnbuckles 1″.

W. W. BIERCE, LTD.
by FRANK DAVIES.

Ralph C. Shaw,
Commissioner.

219 EXHIBIT Y.

Know All Men by These Presents:

That, acting under the authority and pursuant to a resolution of the Board of Directors of William W. Bierce, Limited, a corporation organized under the laws of the State of Louisiana and domiciled in the City of New Orleans, a duly certified copy whereof is hereto annexed, I, the undersigned, William W. Bierce, President of the said William W. Bierce, Limited, for and on behalf of the said corporation do hereby constitute and appoint H. T. Gilbert, a resident of the City f New Orleans but temporarily abiding in the City of San F ancisco, State of California, a true and lawful agent and attorney in fact of the said William W. Bierce, Limited, for and in the place of the said corporation, to endorse and dispose of, upon such terms as to him may seem fit and proper, a certain promissory note made by the Kona Sugar Company, Limited, of Honolulu, through its President, J. M. McChesney, for the sum of Thirty Seven Thousand Forty four Dollars Fifty Three Cents ($37,044.53), dated March 13, 1901, and payable six months after date to the order of William W. Bierce, Limited, at the Whitney National Bank of New Orleans, Louisiana, the said note being secured by 76 bonds of the said Kona Sugar Company, Limited, of the par value of Five Hundred Dollars ($500.00) each, numbered from 1 to 76, both inclusive, and the said H. T. Gilbert is further authorized for and on behalf of the said William W. Bierce, Limited, to transfer and dispose of the said bonds pledged as collateral as aforesaid, together with the said note.

In Witness Whereof, I have hereunto affixed my hand on this fifth day of April, 1901.

(Signed.) Wm W. Bierce.

Ralph C. Shaw
Com'r.

220 Before me, the undersigned authority, personally came and appeared William W. Bierce of the City of New Orleans, to me well known to be the person whose genuine signature is annexed to the foregoing document and to me well known to be the President of the corporation known as William W. Bierce, Limited, of the City of New Orleans, who acknowledged before me, in the presence of E. W. Holden and Chas. Payne Tenner, the undersigned competent witnesses, that he had signed the foregoing document under the authority of and pursuant to the resolution of the Board of Directors of William W. Bierce, Limited, a copy whereof is annexed thereto, and of his own free will and accord for the purposes therein mentioned.

In Witness Whereof, I have hereunto affixed my hand and seal, together with the said William W. Bierce and the said E. W. Holden and Chas. Payne Tenner, competent witnesses as aforesaid, on this fifth day of April, 1901.

(Signed) ? E. W. Holden
Chas. Payne Tenner.

Wm. W. Bierce
J. G. Eustis,
Notary Public.

Ralph C. Shaw
Com'r.

221 At a special meeting of the Board of Directors of William W. Bierce, Limited, held on the fifth day of April, 1901, at the office of the company, the following resolution was offered and, upon motion, unanimously adopted:

Be It Resolved, That William W. Bierce, the President of this Company, be and he is hereby authorized, for and on behalf of this company, to execute in favor of H. T. Gilbert, a resident of this city but temporarily abiding in the City of San Francisco, State of California, a power of attorney authorizing the said H. T. Gilbert, for and on behalf of this Company, to endorse in the name of this Company, and to dispose of on such terms and conditions as to him may seem fit and proper, a certain promissory note executed by the Kona Sugar Company, Limited, through its President J. M. McChesney, for Thirty Seven Thousand Forty Four Dollars Fifty Three Cents ($37,044.53), dated March 13th, 1901, and made payable six months after date to the order of William W. Bierce, Limited, at the Whitney National Bank of New Orleans, Louisiana, the said note being secured by seventy-six (76) mortgage bonds of the said Kona Sugar Company, Limited, at the par value of Five Hundred Dollars ($500.00) each, the said bonds being numbered from 1 to 76, both inclusive, and the said William W. Bierce, President, is further empowered to authorize the disposition by the said H. T. Gilbert of the said bonds.

I, the undersigned, Secretary of William W. Bierce, Limited, hereby certify that the foregoing is a true extract from the minutes of the said Company.

(Signed) W. W. Bouden,
Secretary.

(Seal)

Ralph C. Shaw,
Com'r.

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EXHIBIT B.

Honolulu, H. I., March 13, 1901.

Kona Sugar Company, Limited,
Honolulu, H. I.

Gentlemen:—

In pursuance of the verbal arrangement made between your President and William W. Bierce, Limited, we hereby offer the following terms in settlement of the contract between the Kona Sugar Company Limited and William W. Bierce, Limited, as evidenced by letter dated Feb. 21, 1900, and accepted by the Kona Sugar Company, Limited, Feb. 22, 1900;

We will take in settlement of this contract the sum of $10,000, U. S. gold coin, and the promissory note of the Kona Sugar Company Limited for the sum of $37,044.53, in favor of William W. Bierce, Limited, payable six months after date at the Whitney National Bank in New Orleans, bearing interest at the rate of seven and one-half per cent. (7 1/2%) per annum and secured by First Mortgage Bonds of the Kona Sugar Company, Limited, of par value equal to the note, said bonds being portion of a duly authorized issue not exceeding $200,000. This offer is conditioned upon its acceptance by you payment of the money and the delivery of the note, with collateral, before 4 P. M. on Thursday, March 14th, A. D. 1901.

Upon such payment being made to us before the hour named, we will deliver to you the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting delivery, upon the express condition and understanding that said rails, locomotives, cars, scales and other materials are and shall remain the property
223 of William W. Bierce, Limited, until the full payment of the note above described, according to its terms.

Ralph C. Shaw,
Commissioner.

Very truly yours,
(Signed) W. W. Bierce, Ltd.
By H. T. Gilbert.

Ralph C. Shaw,
Commissioner.

The above terms are accepted this March 13th, 1901.

The Kona Sugar Co. Ltd.,
By its President.
J. M. McChesney.
By its Treasurer,
F. W. McChesney.

Received on account of above agreement exchange on New York for Ten Thousand Dollars and Seventy-Six (76) $500 —Bonds of the Kona Sugar Co.—numbered from 1 to 76 both inclusive.

(Signed) W. W. BIERCE, LTD.,
By H. T. GILBERT.

RALPH C. SHAW,
Commissioner.

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EXHIBIT W.

Honolulu, H. I., March 13, 1901.

$37,044.53.

Six months after date we promise to pay to the order of Wm. W. Bierce, Limited, at the Whitney National Bank of New Orleans La., U. S. A., the sum of Thirty Seven Thousand and Forty four Dollars and 53/100 ($37,044.53) with interest at the rate of seven and one half per cent. per annum until paid, both principal and interest payable in Gold Coin of the United States.

Secured by Bonds of the Kona Sugar Co. of the nominal value of Thirty Eight Thousand Dollars $38,000 (Seventy six Bonds of the value of $500.00 each, numbered from 1 to 76, both numbers inclusive.)

(Signed) THE KONA SUGAR CO. LTD.
By its President.
J. M. MCCHESNEY.

By its Treasurer:
F. W. MCCHESNEY.

Endorsed:
Pay to the order of
HARRY T. GILBERT,

WM. W. BIERCE LIMITED.
by WM. W. BIERCE
Predt.

W. W. BOUDEN
Secty & Treas.

HARRY T. GILBERT

WM. W. BIERCE LTD.
W. W. BOUDEN,
Secty & Treas.

WM. W. BIERCE LTD.
by C. BIERCE
V. Prest.

$7.50 revenue Stamps.

Ralph C. Shaw
225 United States of America,
State of Louisiana.

By This Public Instrument of Protest.

Be It Known, that on this sixteenth day of September, in the year One Thousand Nine Hundred and one, at the request of the

Whitney National Bank of New Orleans,

holders of the original note whereof a true copy is on the reverse hereof written, I, Ambrose G. La Pice,, a Notary Public in and for the City of New Orleans and The Parish of Orleans, State of Louisiana aforesaid, duly commissioned and sworn, Presented the said note to the Cashier, at the Whitney National Bank of New Orleans in this city, where it is made payable, and demanded payment thereof, which was refused, because no funds had been deposited in said bank to pay the same.

Whereupon, I, the said Notary, at the request aforesaid, did Protest, and by these Presents do Publicly and solemnly Protest, as well against the drawer or maker of the said note as against all others whom it doth or may concern, for all exchange, re-exchange, damages, costs, charges and interests, suffered or to be suffered for want of payment of the said note.

Thus Done and Protested, In the Presence of Gustave Le Gardeur Jr. and Philip J. Le Gardeur Witnesses.

Original Signed G. Le Gardeur Jr. P. J. Le Gardeur, A. G. La Pice, Not Pub.

A true Copy of the Original Protest on file and of record in my office.

(Signed) A. G. LA PICE
Not. Pub.

(Notary's Seal)

Ralph C. Shaw
Com'r.

226 Honolulu, H. I., March 13, 1901.

$37,044.53.

Six months after date we promise to pay to the order of Wm. W. Bierce Limited, at the Whitney National Bank of New Orleans, La. U. S. A., the sum of Thirty Seven Thousand and forty four Dollars and 53/100 ($37,044.53) with interest at the rate of seven and one half per cent. per annum until paid, both principal and interest payable in Gold coin of the United States, secured by bonds of the Kona Sugar Co. of the nominal value of Thirty Eight Thousand Dollars ($38,000) Seventy six Bonds of the value of $500.00 each numbered from 1 to 76 both numbers inclusive.

THE KONA SUGAR CO. LTD.
By Its President,
J. M. MCCHESNEY.
By its Treasurer:
F. W. MCCHESNEY.

Endorsed: Pay to the order of Harry T. Gilbert.

W. W. BOUDEN,
Secty. & Treas.
WM. W. BIERCE LIMITED
by WM. W. BIERCE
Predt.
HARRY T. GILBERT
WM. W. BIERCE LTD.
W. W. BOUDEN, *Secty & Treas.*
WM. W. BIERCE LTD.
By C. BIERCE
V. Prest.

Ralph C. Shaw
Comr.

227 Interrogatories of William W. Bierce Limited propounded to the said HARRY T. GILBERT, a witness produced and sworn as aforesaid on the part of said William W. Bierce Limited and his answers thereto, as follows:

Interrogatory 1st: What is your name?

Answer to Interrogatory 1st: My name is Harry T. Gilbert.

Interrogatory 2nd: What is your business at the present time:?

Answer to Interrogatory 2nd: My business at the present time is the railway supply business.

Interrogatory 3rd. What was your business in the year 1900?

Answer to Interrogatory 3rd: My business in the year 1900 was in the employ of William W. Bierce, Limited, acting as their representative in the railway equipment and plantation supply department.

Interrogatory 4th: If your answer to the last preceding interrogatory is that in the year 1900 you were acting as the agent and representative of William W. Bierce, Limited, please examine the Interrogatories Nos. 15 to 24 inclusive and

36 propounded to Columbus Bierce by William W. Bierce in the above entitled cause and also the respective answers to the said interrogatories by Columbus Bierce and state if you know who is the Harry T. Gilbert referred to therein.

Answer to Interrogatory 4th: I have examined Interrogatories Nos. 15 to 24 inclusive and number 36, propounded to Columbus Bierce and also his answers to the said interrogatories and the Harry T. Gilbert referred to therein is myself.

Interrogatory 5th: If your answer to Interrogatory 3 is that in the year 1900 you were acting as the representative of William W. Bierce, Ltd., state in what portion of the United States, if any, you were, during the middle and latter portion of the year 1900.

Answer to Interrogatory 5th: During the latter part of
the year 1900, while acting as the representative of Will-
228 iam W. Bierce, Limited, I was in San Francisco, California.

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Com'r.

Interrogatory 6th: If your answer to the last preceding interrogatory is to the effect that you were in San Francisco, state in what capacity you were there.

Answer to Interrogatory 6th: I was in San Francisco acting in the capacity of representative of William W. Bierce, Limited, during the latter part of the year 1900, there endeavoring to collect for William W. Bierce, Limited, the price of certain railroad equipment, shipped by William W. Bierce, Limited to the Kona Sugar Company, Limited.

Interrogatory 7th. State in detail what, if anything, you did in San Francisco in connection with certain railroad equipment that William W. Bierce, Limited, had shipped to the Hawaiian Islands at the request of the Kona Sugar Company Limited.

Answer to Interrogatory 7th: I arrived in San Francisco December 22, 1900, and remained there four days during which time my efforts were confined to visits to and inquiries of J. M. McChesney's father, M. W. McChesney, in reference to the financial condition and status of the Kona Sugar Company Limited, which was barren of any results. I found, upon my arrival, no officer or representative of the Kona Sugar Company Limited, in San Francisco, and, in compliance with the request of William W. Bierce, Limited, I proceeded to Honolulu for the purpose of collecting the purchase

price of the railroad equipment and materials shipped
229 by William W. Bierce, Limited, to the Kona Sugar Com-
Ralph C. Shaw
Com'r.
pany Limited.

Interrogatory 8th. State when you left San Francisco.

Answer to Interrogatory 8th: I left San Francisco on the 26th of December, 1900.

Interrogatory 9th: State to where you went from San Francisco.

Answer to Interrogatory 9th: From San Francisco, I proceeded direct to Honolulu, Oahu, Territory of Hawaii.

Interrogatory 10th: If your answer to the last preceding interrogatory is to the effect that after leaving San Francisco, you went to Honolulu, Hawaiian Islands, state on what business you went there.

Answer to Interrogatory 10th: I went to Honolulu from San Francisco at the request of William W. Bierce, Limited, for the purpose of collecting for William W. Bierce, Limited, from the Kona Sugar Company Limited, the price of certain railroad equipment, shipped by the former to the latter.

Interrogatory 11th: If in answer to the last preceding interrogatory you have stated that you went to Honolulu on business in connection with certain railroad equipment, shipped to the Hawaiian Islands by William W Bierce, Limited, state where, if anywhere, you found the said railroad equipment after your arrival in Honolulu.

Answer to Interrogatory 11th: Upon my arrival at Honolulu, I found the railroad equipment shipped by William W. Bierce, Limited, to the Kona Sugar Company, Limited, stored adjacent to the wharf.

Interrogatory 12th: State in whose possession the
230 said railroad equipment was.
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Com'r.

Answer to Interrogatory 12th: I found the railroad equipment in question in the possession of the steamship company by which it was carried from San Francisco to Honolulu. I do not remember the name of the transportation company.

Interrogatory 13th: State in detail what transactions, if any, you had with the Kona Sugar Company, Limited, with reference to this railroad equipment.

Answer to Interrogatory 13th: After repeated and numer-

ous visits and conversations with J. M. McChesney, President of the Kona Sugar Company, Limited, I realized it was utterly impossible to collect in cash the full amount of the purchase price of the material of the railroad equipment shipped by William W. Bierce, Limited, to the Kona Sugar Company, Limited, and proposed a settlement on the basis of $20,000 cash, balance by note at 7 per cent. interest to be secured by $30,000 of 15 years 6 per cent. bonds of the Kona Sugar Company Limited. This proposition Mr. J. M. McChesney told me in person he would take up with the Bank in Honolulu and ascertain whether or not they were willing to let him have the funds with which to settle upon this basis. A day after the submission of the proposition Mr. J. M. McChesney sent for me and told me the very best he could do was $5000 in cash, the balance by promissory note secured, by $40,000 of 15 years 6 per cent. bonds of the Kona Sugar Company, Limited. This proposition was rejected and I submitted a counter proposition of $10,000 cash, balance by promissory

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231 note secured by $38,000, 15 year 6 per cent. bonds of the Kona Sugar Company Limited, upon the condition that the railroad equipment in question was to remain the property of William W. Bierce, Limited, until the note should be fully paid. After a day's consideration, this proposition was agreed upon verbally between myself and Mr. J. M. McChesney, and was thereupon reduced to writing, signed by me in behalf of William W. Bierce, Limited, and accepted in writing by Mr. J. M. McChesney, in behalf of the Kona Sugar Company, Limited, under date of March. 13th, 1901, and has been attached to the deposition of Mr. Columbus Bierce, taken in this cause, indentified as "Exhibit B" At the same time of the acceptance and delivery to me by the Kona Sugar Company, Limited of the instrument last mentioned by me, I received from the Kona Sugar Company, Limited, its two drafts for $5,000 each, in the form of New York exchange, payable to the order of William W. Bierce, Limited, and its one promissory note bearing date March 13th, 1901, for $37,044.53, payable six months after date to the order of William W. Bierce, Limited, at the Whitney National Bank of New Orleans, Louisiana, bearing interest at the rate of 7 1/2 per cent. per annum, both principal and interest payable in Gold Coin of the United States and also at the same time, I received as collateral to said notes 76 bonds of the Kona Sugar Com-

pany, Limited, of the par value of $500. each, or $38,000 in the aggregate, numbered from 1 to 76, both inclusive.
232 Thereupon, I caused to be delivered by the bank of

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Bishop and Company to the Kona Sugar Company, Limited, the bills of lading of the various shipments of the railroad equipment in question, released from the drafts elsewhere mentioned in my testimony, which were cancelled.

Interrogatory 14th: State what conversation, if any, you had with the Kona Sugar Company, Limited, in reference to this railroad equipment.

Answer to Interrogatory 14th: This railroad equipment was shipped by William W. Bierce, Limited, to Honolulu, by way of San Francisco, and at the time of making each shipment, the same was billed to the order of William W. Bierce, Limited, to Honolulu, Hawaiian Islands, with directions written on each bill of lading to notify the Kona Sugar Company, Limited, at point of destination, the bill of lading being endorsed by William W. Bierce, Limited to the order of the Kona Sugar Company, Limited. At the same time, the draft against the price of the shipment was drawn by William W. Bierce, Limited, on the Kona Sugar Company, Limited, and was sent forward with the bill of lading of the shipment thereto attached for collection through the Bank in the usual course of business. Upon my arrival at Honolulu, I found these drafts drawn against the prices of the various shipments of the railroad equipment in question with the bills of lading thereto attached in the bank of Bishop & Company for collection, by whom they had been received for that purpose in the usual course of business. Upon my arrival at Honolulu, I called at the banking house of Bishop & Co. and saw these Bills of lading and drafts and was told by Mr. Carter and Mr. Damon, both representatives of

Ralph C. Shaw
Com'r.

233 the bank that the drafts in question had been presented to the Kona Sugar Company Limited and that payment thereof had been demanded by the bank from the Kona Sugar Company, Limited, but had been refused. I then called at the offices of the Kona Sugar Company, Limited, in Honolulu, where I met Mr. J. M. McChesney, President, and Fred McChesney, Secretary and Treasurer of the Company, and told them that I had seen the drafts and bills of lading at the bank

of Bishop and Company and found that payment of the drafts had been refused and inquired of them why the drafts had not been paid and the bills of lading taken up by the Kona Sugar Company, Limited, whereupon Mr. J. M. McChesney replied that owing to the want of funds, the Kona Sugar Company, Limited, had been unable to pay the drafts. That he was using every endeavor to obtain funds which would enable them to pay the drafts and take up the bills of lading. At this conversation, Mr. J. M. McChesney asked me for an extension of a week or two's time in which to pay the drafts, which I told him I would grant. At the expiration of this extension of time, I again called at the office of the Kona Sugar Company, Limited, where I again saw Mr. J. M. McChesney and had another conversation with him in which I inquired of him whether the company was then ready to pay the drafts in question and take up the bills of lading, to which inquiries, he answered that he had not yet been able to secure funds with which to pay the drafts and take up the bills of lading, and he again asked me for a short extension of time, which I told him I would grant. I afterwards 234 had other conversations with J. M. McChesney, substan-

Ralph C. Shaw
Com'r.

tially to the same effect as those I have detailed. These conversations were repeated and numerous and always with the same result of lack of funds with which to pay the drafts, and were prolonged from the time of my arrival in Honolulu in the forepart of January, 1901, to early in March, 1901. At the first conversation had with J. M. McChesney at the offices of the Kona Sugar Company, Limited, upon my arrival in Honolulu, which I have mentioned, there was no one present except J. M. McChesney, Fred McChesney and myself. At the other conversations I have mentioned, the same persons were present and no one else. Finally, despairing of collecting the full purchase price of the railroad equipment in question in cash, I began to propose a settlement upon a different basis, as stated in my answer to the 13th Interrogatory of this, my deposition.

Interrogatory 15th. Please examine exhibit B attached to Interrogatory 24th of the Interrogatories of William W. Bierce, Limited, to be propounded to Columbus Bierce, in the above entitled cause, and state, if you can, whether or not you ever saw before the said document attached to the said Interrogatories as Exhibit B. The document referred to being a typewritten letter dated March 13th, 1901, addressed to the Kona Sugar Company, Limited, and purporting to be signed by William W. Bierce, Limited, by H. T. Gilbert.

Answer to Interrogatory 15th: I have examined Exhibit B attached to the interrogatories and answers of Columbus Bierce, and specially referred to in Interrogatory 24.
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Com8r.

235 Yes, I have seen this document before. It was drafted and written by Mr. Ballou, of Kinney, Ballou & McClanahan in their offices in the Judd Building Honolulu,, at the dictation of Mr. Ballou of that firm, and at my request. This is also the same instrument referred to in my answer to the 13th Interrogatory of this, my deposition.

Interrogatory 16th: State whether or not the words "H. T. Gilbert" appearing twice on the second page of said Exhibit B, referred to in the last preceding interrogatory, immediately under the words "W. W. Bierce, Ltd.," are your signature.

Answer to Interrogatory 16th: Yes. The words H. T. Gilbert appearing twice on the second page of said exhibit B referred to in the last preceding interrogatory, number 15, immediately under the words, "W. W. Bierce, Ltd." are my genuine signature.

Interrogatory 17th: Have you ever seen J. M. McChesney of Honolulu, Hawaiian Islands, write?

Answer to Interrogatory 17th: Yes. I have seen J. M. McChesney of Honolulu, Hawaiian Islands, write on several occasions, and have repeatedly seen him sign his name.

Interrogatory 18th: If your answer to the last preceding Interrogatory is in the affirmative, please examine the words "J. M. McChesney" on the said page 2 of the said Exhibit "B" referred to in Interrogatories 15th and 16th and state if you know whether that is his signature.

Answer to Interrogatory 18th: Yes. The words "J. M. McChesney" appearing on page 2 of Exhibit "B" referred to in Interrogatories number 15 and 16 are the genuine signature of J. M. McChesney, I having been present and seen
236 him affix the said signature to the original document.
Ralph C. Shaw
Com'r.

Interrogatory 19th: Have you ever seen F. W. McChesney of Honolulu, Hawaiian Islands, write?

Answer to Interrogatory 19th: Yes. I have seen F. W.

McChesney of Honolulu, Hawaiian Islands, write on several occasions and have repeatedly seen him sign his name.

Interrogatory 20th: If your answer to the last preceding Interrogatory is in the affirmative, please examine the sugnature of F. W. McChesney on the said second page of the said Exhibit "B" referred to in Interrogatories 15, 16, 17 and 18, and state if you know whether or not that is his signature.

Answer to Interrogatory 20th: I have examined the signature of F. W. McChesney appearing on the second page of Exhibit "B" referred to in Interrogatories numbers 15, 16, 17 and 18, and I know that it is the genuine signature of F. W. McChesney, I having been present and seen him sign his name to said original document.

Interrogatory 21st: Please examine the Exhibits attached to the answers of Columbus Bierce to the interrogatories propounded to him in the above entitled cause, by William W. Bierce, Limited, and state if you can whether or not you ever saw before the document attached to the said answers as an exhibit to answer 30 of said interrogatory. The said answer being in answer to Interrogatory 30 of the said Interrogatories and the document referred to being in the form of a promissory note for $37,044.53, dated Honolulu, March 13th,
1901, and purporting to be signed by The Kona
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Com'r.
237 Sugar Company, Limited, by its President, J. M. McChesney, and by its Treasurer, F. W. McChesney, and the said note purporting to be endorsed to the order of Harry T. Gilbert by Wm. W. Bierce, Limited, by Wm. W. Bierce, President, and W. W. Bouden, Secretary and Treasurer, and purporting to be endorsed in blank by Harry T. Gilbert and purporting to be endorsed in blank by Wm. W. Bierce, Limited, by W. W. Bouden, Secretary and Treasurer, and by Columbus Bierce, Vice President.

Answer to Interrogatory 21st: I have examined the exhibits attached to the answers of Columbus Bierce to the interrogatories propounded to him by William W. Bierce, Limited. Yes. I have seen before the document attached to the said answers as an exhibit to Answer 30 of Interrogatories, the same being a promissory note for $37,044.53, dated Honolulu, March 13th, 1901, signed "The Kona Sugar Company, Limited" by its President, J. M. McChesney, and by its Treasurer F. W. McChesney and endorsed to the order of myself, Harry T. Gilbert, by William W. Bierce, Limited, by

William W. Bierce, President and W. W. Bouden, Secretary and Treasurer. Furthermore, endorsed in blank by myself Harry T. Gilbert as well as endorsed in blank by William W. Bierce, Limited, by W. W. Bouden, Secretary and Treasurer, and by Columbus Bierce, Vice President.

Interrogatory 22nd: State if you know, whether or not, the words "Harry T. Gilbert" appearing on the back of said exhibit referred to in the last preceding interrogatory immediately under the words "By Wm. W. Bierce, predt" are your signature.

Answer to Interrogatory 22nd: Yes. The words

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238 "Harry T. Gilbert" appearing on the back of said exhibit referred to in Interrogatory number 21, immediately under the words "By Wm. W. Bierce, predt" are my genuine signature.

Interrogatory 23rd: If your answer to Interrogatory 17 is in the affirmative, please examine the words "J. M. McChesney" on the face of the exhibit referred to in Interrogatory 21, the said words being at the bottom of the said exhibit and immediately under the words "by its President" and state if you know whether or not the said words "J. M. McChesney" are the signature of J. M. McChesney, referred to in Interrogatory 17.

Answer to Interrogatory 23rd: I have examined the words "J. M. McChesney" on the face of the exhibit referred to in Interrogatory number 21, the said words being at the bottom of said exhibit and immediately under the words "by its president" and I know that the said words "J. M. McChesney" are the genuine signature of J. M. McChesney, referred to in Interrogatory number 17.

Interrogatory 24th: If your answer to Interrogatory 19 has been in the affirmative, please examine the words "F. W. McChesney" upon the face of the exhibit referred to in the last preceding interrogatory in the letter, left corner thereof, immediately under the words "by its Treasurer" and state if you can whether or not the words "F. W. McChesney" are the signature of the said F. W. McChesney referred to in Interrogatory 19.

Answer to Interrogatory 24th: I have examined the words "F. W. McChesney" upon the face of the exhibit referred to in the last preceding interrogatory in the lower left hand

corner thereof, immediately under the words "by its
239 treasurer" and I know that the said words "F. W. Mc-
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Com'r.
Chesney" are the genuine signature of the said F. W. McChesney referred to in Interrogatory number 19.

Interrogatory 25th: State if you know, what, if anything, was done with the railroad equipment already referred to, after March 13th, 1901.

Answer to Interrogatory 25th: After March 13th, 1901, the railroad equipment in question was transported from Honolulu, Island of Oahu, to the Kona District of the Island of Hawaii, and there used in constructing and operating the Plantation railroad of Kona Sugar Company, Limited. In the latter part of December, 1901, I made a second trip to Honolulu, Hawaiian Islands, as a representative of William W. Bierce, Limited, for the purpose of collecting the unpaid balance of the purchase price of the railroad equipment in question, and, on this occasion, I visited the Island of Hawaii, and the plantation of the Kona Sugar Company, Limited, and while there saw the railroad equipment in question was used and operated in constructing and running the Plantation Railroad of the Kona Sugar Company, Limited, in connection with its sugar mill, and I then saw the locomotives and cane cars in operation in the work of hauling cane to the mill.

Interrogatory 26th: If your answer to the last preceding interrogatory has been, among others things, to the effect that it was delivered to the Kona Sugar Company, Limited, state if you know in detail of the articles of railroad equipment with those delivered.

Answer to Interrogatory 26th: Yes. I do know in detail what articles of railroad equipment were conditionally de-
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Com'r.
240 livered by William W. Bierce, Limited, to the Kona Sugar Company, Limited, on or about March 13th, 1901, and said articles in detail are as follows:

10	sets # 35 # split switches,	$ 545.00
180	kegs Spikes	1,440.00
1	9 X 14 Dickson Loco	3,755.00
1	re-railer,	25.00
4	Track gaugers,	8.00
1	Rail Bender,	35.00
1	Track Drill,	12.50
1	Section car,	90.00
2	Jacks,	36.00
1	25 ton track scale,	500.00
	Rails 365 G. T.	16,813.42
	Angle bars,	1,520.68
1	10 X 16 3′ Guage Locomotive,	5,495.00
16	Flat cars,	$35,440.60
		$35,715.60

(Signed) Harry T. Gilbert.

Subscribed and sworn to before me this 26th day of September, A. D. 1903.

(Signed) Ralph C. Shaw
Commissioner.

Ralph C. Shaw
Com'r.

241 State of Illinois, }
Cook County. } ss.

I, Ralph C. Shaw, of the City of Chicago, in the County of Cook and state of Illinois, a commissioner duly appointed to take the depositions of the said Columbus Bierce and Harry T. Gilbert, witnesses, whose names are subscribed to the foregoing depositions respectively, do hereby certify that previous to the commencement of the examination of the said Columbus Bierce and Harry T. Gilbert, as witnesses in the said suit between the said R. W. McChesney, J. M. McChesney and F. W. McChesney, carrying on business under the name, of M. W. McChesney & Sons, plaintiffs, and the said Kona Sugar Company, Limited, et al., defendants, and the said Kapiolani Estate, Limited, et al., intervenors, they were duly severally sworn by me as such commissioner to testify the truth in relation to the matters in controversy between the said William W. Bierce, Limited, and the said plaintiffs, defendants and other intervenors in said suit, so far as they should be interrogated concerning the same; that the said

depositions were taken at Room 1412 Monadnock Block, in the City of Chicago, in the County of Cook and State of Illinois, on the 26th day of September, A. D. 1903; and that after said depositions were taken by me as aforesaid, the interrogatories and answers thereto as written down of the said depositions of Columbus Bierce were read over to the said witness, Columbus Bierce, and that thereupon the same was signed and sworn to by the said Columbus Bierce before me, the oath being administered by me, the said Ralph C. Shaw, as such Commissioner, and the interrogatories and answers thereto as written down of the said deposition of Haway T. Gilbert were read over to the said witness, Harry T. Gil-
242 bert, and thereupon the same was signed and sworn to by the said Harry T. Gilbert before me, the oath being administered by me, the said Ralph C. Shaw, as such commissioner, at the place and on the day and year last aforesaid.

In Witness Whereof, I have hereunto set my hand and seal this 26th day of October, A. D. 1903.

(Signed) RALPH C. SHAW
Commissioner.

Commissioner's Fees $ Fifty Dollars $50.00
Paid by William W. Bierce, Limited.

(Signed) RALPH C. SHAW
Commissioner.

EXHIBIT Z.

RALPH C. SHAW
Com'r.

243 (Here follows the same writing shown as Exhibit "Z" on page 211 of original transcript ante p. 145 which to avoid reprinting is here omitted.)

EXHIBIT "A"

R. C. S.
Com'r.

Honolulu, Hawaiian Islands, Feby. 21, 1900.

244-249 (Here follows the same instrument shown as Exhibit "A" on pages 212-218 of original transcript ante pp. 145-150 which to avoid reprinting is here omitted.)

EXHIBIT "Y".

R. C. S.
Com'r.

250-252 (Here follows the same instrument shown as Exhibit "Y" on pages 219-221 of original transcript ante pp. 150-152 which to avoid reprinting is here omitted.)

PLFF. EXH. "D"

253-254 (Here follows the same instrument shown as Exhibit "B" on pages 222-223 of original transcript ante pp. 153-154 which to avoid reprinting is here omitted.)

EXHIBIT "W"

R. C. S.
Comr.

255-257 (Here follow the same instruments shown as Exhibit "W" on pages 224-226 of original transcript ante pp. 154-156 which to avoid reprinting are here omitted.)

258 The following Exhibits offered in evidence on the trial of said cause by counsel for the plaintiff, and which were received and read in evidence on said trial and were marked for identification, and are in words and figures following, to-wit:

EXHIBIT A.

259 (Here follows the same writing shown as Exhibit "Z" on pages 211 and 243 of original transcript ante p. 145 which to avoid reprinting is here omitted.)

EXHIBIT B.

260-265 (Here follows the same instrument shown as Exhibit "A" on pages 212-218 and 244-249 of original transcript ante pp. 145-150 which to avoid reprinting is here omitted.)

EXHIBIT C.

266-268 (Here follows the same instrument shown as Exhibit "Y" on pages 219-221, and as Exhibit "Y" and Plaintiff's Exhibit "C" on page 250-252 of original transcript ante pp. 150-152 which to avoid reprinting is here omitted.)

EXHIBIT D.

269-270 (Here follows the same instrument shown as Exhibit "B" on pages 222-223 of original transcript, and as Exhibit "B" and Plaintiff's Exhibit "D" on pages 253-254 of original transcript, ante pp. 153-154 which to avoid reprinting is here omitted.)

EXHIBIT E.

271 (Here follows the same instrument, being promissory note of The Kona Sugar Company, Limited, dated March 13, 1901, payable six months after date to the order of William W. Bierce, Limited, for $37,044.53, etc., shown as a part of Exhibit "W" on pages 224-226, and as a part of Exhibit "W" and Plaintiff's Exhibit "E" on pages 255-257, of original transcript, ante pp. 154-156 which to avoid reprinting is here omitted.)

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EXHIBIT F.

Law Offices of
Kinney & McClanahan.
Judd Building
Honolulu, Hawaii.

William A. Kinney
Edmund B. McClanahan
Charles S. Dole
S. Hasket Derby

July 18th, 1903

Cable address "Hawaii" Honolulu Lieber's Code.

C. J. Hutchins, Trustee,
City/.

Dear Sir:

In behalf of William W. Bierce Ltd, we hereby make demand upon you for the return to us forthwith of the following property belonging to us, but now in your possession:—

362 Tons of steel T. Rails weighing 35 lbs to the yard.
Joints for laying 550 tons of steel T. Rails.
Railroad track spikes to lay 550 tons of said rails.
10 sets of 35 lb. split switch material, complete.
16 cars, 25 feet long, 7 feet wide for 3 feet gauge track
1 9 x 14 Class "A" saddle tank locomotive
1 10 x 16 back saddle tank locomotive
1 Howe Narrow Gauge Track Scale, capacity 25 tons.
1 set re-railers
4 track gaugers 3 feet
1, rail bender
1 track drill
1 section car with seats
2 Jacks.

The said property is that property which William W. Bierce Ltd. delivered to the Kona Sugar Co. Ltd, under the contract of March 13th, 1903. Our demand is for a return of all the property herein enumerated and of each and every portion thereof that you may have in your possession at the present time. We hereby tender and state our willingness to return to you upon the delivery to us of the aforesaid property, the promissory note of the Kona Sugar Company, Limited, executed by it to William W. Bierce un-
der date of March 13th, 1901 for $37,044.53 and also
273 the 76 bonds of the Kona Sugar Co. Ltd, now held by
William W. Bierce, the said bonds being numbers 1-76 inclusive. Failure by you to answer this request and to comply therewith will be considered by us as a refusal.

Truly Yours
KINNEY & McCLANAHAN
S. H. D.
Attorneys for William W. Bierce Ltd.

Plff's. Exhibit "F".
Filed, March 7th, 1904 by
Mr. McClanahan.
P. D. KELLETT, JR.,
Clerk.

EXHIBIT G.

274-275 (Here follow the same instruments, being the promissory note of The Kona Sugar Company, Limited, and instrument of protest thereof aforesaid, shown as Exhibit "W" on pages 224-226, and as Exhibit "W" and Plaintiff's Exhibit "E" on pages 255-257, of original transcript, said note being also shown as Exhibit "E" on page 271 of original transcript, ante pp. 154-156 which to avoid reprinting are here omitted.)

276

PLFF EXH "H"

Act 36 of the Acts and Resolutions Passed by the General Assembly of the State of Louisiana, Begun and Held at the City of Baton Rouge on the 14th Day of May, A. D. 1888, Which Adjourned on Thursday, the 12th Day of July, A. D. 1888, Being the Act Under Which the Corporation William W. Bierce, Limited, Received Its Charter.

No. 36.

An Act

To provide for the formation of corporations for certain purposes, limiting the capital of the same, and the liability of the stockholders thereof.

The formation of corporations for certain purposes authorized.

Section 1. Be it enacted by the General Assembly of the State of Louisiana, That it shall be lawful for any number of persons, not less than three, upon complying with the provisions of the laws of this State governing corporations in general, to form themselves into and constitute a corporation for the purpose of carrying on any lawful business or enterprise, not otherwise specially provided for, and not inconsistent with the constitution and laws of this State; provided that no such corporation shall engage in stock jobbing business of any kind; the corporations herein provided for to have a capital stock of not less than five thousand dollars.

Proviso.

The word "limited" to be the last word of the name of every corporation.

Sec. 2. The word "limited" shall be the last word of the name of every corporation
277 formed under the provisions of this act;
and every such corporation shall paint or

affix, and shall keep painted or affixed, its name on the outside of every office or place in which the business of the corporation is carried on, in a conspicuous position, in letters easily legible, and shall have its full name mentioned in legible characters in all notices, advertisements and other official publications of such corporations, and in all bills of exchange, promissory notes, checks, orders for money, bills of lading, invoices, receipts, letters, and other writing used in the transaction of the business of the corporation; provided, that the omission of the word "limited" in the use of the name of the corporation shall render each and every person participant in such omission, or knowingly acquiescing therein, liable for any indebtedness, damage or liability arising therefrom.

Penalty for omitting the word "limited."

Sec. 3. Be it further enacted, etc., That no stockholder of such corporations shall ever be held liable or responsible for the contracts or faults of such corporation in any further sum than the unpaid balance due to the company on the shares owned by him; nor shall any mere informality in organization have the effect of rendering a charter null or of exposing a stockholder to any liability beyond the amount of his stock.

Liability of the stockholders.

278 Sec. 4. Be it further enacted, etc., That all laws or parts of laws in conflict or inconsistent with the provisions of this act, be and the same are hereby repealed.

Repealing clause.

S. P. Henry,
Speaker of the House of Representatives.
James Jeffries,
Lieutenant Governor and President of the Senate.

Approved June 29, 1888.

Francis T. Nicholls,
Governor of the State of Louisiana.

A true copy from the original:
Jos. Gebelin,
Assistant Secretary of State.

279 PLAINTIFFS' EXHIBIT "I".

Minutes of Directors Meeting Held Mch. 16-1901.

Present—J. M. McChesney F. W. McChesney W. W. Hall, W. L. Hopper, J. S. Walker & E. O. White.

Minutes of Directors Meeting held Jan 31/01 read and approved. A written offer from W. W. Bierce Ltd. was read and discussed, after which the following resolution was read and on motion duly 2nd and unanimously approved.

Honolulu, H. I. Mch 16 1901.

Whereas, The Company is under contract with Messrs Wm. W. Bierce Co. New Orleans Lo. for railway material, amounting to about the sum of Forty seven thousand dollars with interest and charges to date, part of which material is now in Honolulu; and

Whereas, an offer was made by the said Wm. W. Bierce Co. through their authorized agent Harry T. Gilbert to accept in payment and security therefor Ten thousand dollars in U. S. Gold and Bonds of the Company to the amount of $38000—taking the companys note for 6 mos. for balance due interest at 7-1/2 per cent per year—secured by the above mentioned Bonds to the nominal value of thirty eight thousand dollars, and the President agreed to such terms and made payment through the companys agents M. W. McChesney Sons to the said Wm. W. Bierce Co the sum of ten thousand dollars, and did executed and delivered to them the companys note for $37044.53 duly signed by the President and Treasurer payable in 6 months from this date with interest at 7-1/2% per year till paid, secured by the company's Bonds of the nominal value of thirty-eight thousand dollars (which Bonds were delivered to the said agent of Wm. W. Bierce Co. and receipt taken therefor).

Therefore, Be it resolved that the settlement as made by
the President Treas the action of the President and
280 Treasurer in delivering the Company's bonds in the sum
of Thirty Eight thousand dollars as security in settlement therefor, be and the same is hereby approved and ratified by the Directors of the Company.

The following resolutions were then read & on motion duly 2nd were unanimously approved.

Honolulu, H. I. March 16 1901.

Whereas, an offer has been made by Messrs Bishop & Co.

to take Bonds of the company lately authorized to the amount of fifty thousand dollars at 95,

Be it Resolved, That the President and Treasurer be and is hereby to sell and deliver Bonds of the Company of the amount of fifty thousand dollars at 95 net in accordance with the offer herein made, and apply the proceeds on account of sums due the agents Messrs M. W. McChesney & Sons by the Company for advances heretofore made.

Be it resolved further that the President and Treasurer be and is hereby authorized without notice from the Directors to sell and deliver any of the remaining portion of the Co's Bonds at not less than 95. and apply the proceeds to the expenses of the Co. or to the liquidation of any of its debts.

Honolulu, H. I. March 16 1901.

Whereas The Company is indebted to its Agents Messrs M. W. McChesney & Sons, in the sum of one hundred thousand dollars ($100000) on open acct, and further sums are required to carry on work of the plantation which the agents promise to make provided the payment of the balance of the company's acct. is secured by Bonds of the Co's. lately authorized,

Be it Resolved, That the Company secure the payment to the Agents of the balance of its acct with them and any further advances made by a mortgage or pledge of the Co's.
281 Bonds of the nominal value of one hundred thousand dollars, and the President and Treasurer are hereby authorized to execute such mortgage in the name and on behalf of the company.

The claim of Mr. Wilgeroth for money due on account of Machinery, was next brought up and action deferred till such time as the Mill was running to it full capacity, and said machinery could be tested.

It was moved the the Co. take the offer of Mrs. Greenwell to accept $1000.00 for her claim to lower portion of land now claimed by the Co. Puapuaiki which land she claims a 1/2 interest in. 2nd and carried unanimously. Meeting then adjourned.

E. O. White
Sec. Kona Sugar Co. Ld.

282 The stipulation filed in said Circuit Court of the First Judicial Circuit on the 2nd day of March, 1904, which was offered, received and read in evidence on the trial of said cause, and is in words and figures following, to wit:

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT

Territory of Hawaii.

William W. Bierce Limited,
Plaintiff.
vs.
C. J. Hutchins, Trustee,
Defendant.
} Replevin.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above cause that the deposition of Alexander Lindsay, Jr., a witness for the plaintiff herein, may be taken before Gussie H. Clark, Notary Public of the First Circuit on Thursday, March 3rd, at 11:30 A. M.; that said Gussie H. Clark may act as stenographer in the taking of said estimony; said testimony when so taken may be used in any trial or trials of the above cause with the same force and effect as if the said Alexander Lindsay Jr., were personally present and testifying; said testimony to be taken subject to all rights of objection and exception save as to the form of the questions, to which objections shall be made at the time.

Dated March 1st, 1904.

WILLIAM W. BIERCE LIMITED
By KINNEY, MCCLANAHAN & COOPER
its attorneys.
CLINTON J. HUTCHINS,
Trustee
By JNO. W. CATHCART
His attorneys.

(Endorsed): Filed March 2nd, 1904. P. D. Kellett, Jr., Clerk.

283 The deposition of Alexander Lindsay, Jr., and exhibit thereto attached, which were filed in the office of said Circuit Court on the 4th day of March, 1904, and were offered, received and read in evidence on the trial of said cause, and are in words and figures following, to-wit:

284 IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT.

Territory of Hawaii.

December 1903 Term.

William W. Bierce Limited, a corporation,
Plaintiff.
vs.
Clinton J. Hutchins, Trustee.
Defendant.
Replevin.

Deposition of Alexander Lindsay Jr.

This is a hearing had in pursuance of stipulation dated March 1st, 1904, between William W. Bierce Limited and Clinton J. Hutchins, Trustee, for the purpose of taking the testimony of Alexander Lindsay Jr., a witness for the plaintiff before Gussie H. Clark, Notary Public. Said witness to be examined and his testimony taken on Thursday March 3rd, 1904, at 11:30 O'clock A. M.

At the Hour of 11:30 O'clock A. M. of Thursday the 3rd day of March 1904, and in pursuance to stipulation, there appeared at the Office of Kinney, McClanahan & Cooper, Mr. John W. Cathcart, representing Clinton J. Hutchins the defendant, E. B. McClanahan of the firm of Kinney, Mc-
285 Clanahan & Cooper, representing William W. Bierce Limited, the plaintiff, Gussie H. Clark, Notary Public and stenographer, and Alexander Lindsay Jr.

The said ALEXANDER LINDSAY JR. being first sworn that the evidence to be given in the action entitled "William W. Bierce Limited, Plaintiff vs. Clinton J. Hutchins, Trustee, Defendant", shall be the truth the whole truth and nothing but the truth, testified on direct examination as follows:

By Mr. McClanahan;

Q. What is your name? A. Alexander Lindsay Jr.

Q. What is your business, Mr. Lindsay? A. Attorney at law, Second District Magistrate of the District of Honolulu.

Q. What was your business during the month of May 1903? A. I was an attorney at law.

Q. Practicing in the courts of this Territory? A. Yes.

Q. During the Month of May 1903 were you employed by the firm of Kinney, McClanahan & Bigelow in any matter connected with William W. Bierce Limited, a corporation? A. I was.

Q. What was the nature of the employment, state what you did under it? A. I was engaged by the firm of Kinney, McClanahan & Bigelow to proceed to Kona, and at the auction sale of the Kona Sugar Company, Limited Estate, which was proposed, I was instructed to make a protest on behalf of William W. Bierce Company, Limited against such sale.

Q. What was this sale—what was the nature of the
286 sale? A. It was a Receiver's sale made under order
of the Judge of the Third Circuit Court.

Q. Did you make such protest? A. I did.

Q. In what form did you make it? A. After the auctioneer stated the purpose of the sale, I then read aloud a notice that I had with me protesting against that sale.

Q. Would you recognize a copy of the notice if shown you? A. I would.

Q. Do you know where the original is? A. The original I handed to the agent of the purchaser.

Mr. McClanahan: I hand you a paper and ask if you can identify it?

A. No, I can't.

Mr. McClanahan: I hand you another paper and ask if you can identify it.

A. Yes, this a copy of the notice that I read immediately preceding this sale, and immediately after the sale. I read it twice.

Q. Who did you read it to immediately following the sale? A. Immediately following the sale,

Mr. Cathcart: I object to that as incompetent, irrelevant and immaterial as to what he did after the sale.

Mr. McClanahan:

Q. Who did you read it to after the sale? A. To
287 Robert Shingle, Robert W. Shingle who had bid in the
place and when the place was knocked down that he had purchased for C. J. Hutchins, Trustee.

Q. When did you deliver to Mr. Shingle the copy of the notice referred to? A. Immediately following the sale, that is, all I had to do was to fill in his name, which probably took five monutes, the dates, etc., and then I handed him it.

Mr. Cathcart. Same objection.

Q. Who was present at the sale at the time you first read the notice and protest? A. A large number of spectators among whom I recollect J. K. Nahele, Deputy Sheriff of Kona, C. W. Ashford, John Colburn, M. F. Scott, Mr. Dortch, Receiver of the Kona Sugar Company, one of the Warrens of Smith & Lewis, Jacob Coerper, J. P Curts, but I could not remember any more.

Q. Was Mr. Shingle there? A. Robert W. Shingle, yes.

Mr. McClanahan: We ask that the notice and demand identified by the witness as being the notice read prior to the sale and handed to the defendant's agent, Robert W. Shingle after the sale, and again read to Robert Shingle after the sale be attached to his deposition in the case, and marked Exhibit "A".

Mr. Cathcart. We object to said instrument being attached to said deposition on the ground that no proper foundation has been laid for the introduction of the copy of notice; that there has been no proof made of the agency as ststaed by counsel for the plaintiff and on the further ground that it is incompetent, irrelevant and immaterial.

288 Mr. McClanahan:

Q. Did Mr. Robert W. Shingle hear you read this notice protesting against the sale? A. Yes.

Q. How close was he to you at the time you so read it? A. Within six feet, I stood in the door of the Court House, and we were all around, some standing outside of the door and others standing inside of the door.

Q. What voice did you read it in A. Very loud voice.

Q. What was said by Mr. Shingle at the time you handed to him this notice and demand? A. Nothing.

Q. What was said by Mr. Shingle after you had read to him first filling in his name or the name of C. J. Hutchins Trustee? A. Nothing.

Q. What was said by anyone after you had read this notice and demand prior to the sale? A. Nothing.

Q. What was the date of the sale? A. The 9th of May 1903.

Mr. Cathcart:

No Cross-Examination.

(Signed) Alexander Lindsay Jr.

This is to Certify that I have truly and faithfully transcribed the questions propounded to the witness Alexander Lindsay Jr. and the answers to the same given by him, and that the foregoing pages numbered 1-2-3-4- and 5 inclusive is such true transcript.

Dated March 3rd, A. D. 1904.

(Seal) (Signed) GUSSIE H. CLARK
Notary Public and Stenographer.

289 L. 5782. Plff. Ex. "G"
Filed Mch. 7th, 1904 by
Mr. McClanahan
(Sig) P. D. Kellett, Jr.
Clerk.

EXHIBIT "A."

To All Whom It May Concern:

Notice is hereby given that William W. Bierce Limited, a corporation, doing business under the laws of Illinois the State of Illinois and Louisiana, is the owner of the following articles of railroad equipment at the present time being used on the plantation of the Kona Sugar Company, Limited as a plantation railroad.

362 tons of steel T. Rails weighing 35 lbs. to the yd.
Joints for laying 550 tons of steel T. rails
Railroad track spikes to lay 550 tons of said rails
10 sets of 35 lb. split switch material, complete
16 cars 28 feet long 7 feet wide for 3 feet gauge track
One 9x14 Class "A" saddle tank locomotive
One 10x16 Class "M" back saddle tank locomotive
One Howe narrow gauge track scale, capacity 25 tons
One set re-railers
Four track gaugers 3 feet
One rail bender
One track drill
One section car with seats
Two Jacks.

The said William W. Bierce Limited claims to be and is the owner, and as such owner is and claims to be entitled to the immediate possession of the aforesaid articles and each and all of them. The said articles are merely temporarily and wrongfully in the possession of the Kona Sugar Company, Limited and F. L. Dortch Esq., as the Receiver of the said Company: the said William W. Bierce Limited has taken and is now prosecuting legal measures against the Kona 290 Sugar Company Limited, F. L. Dortch the Receiver of said Company and other interesting parties to re-gain the said property above described and all portions thereof.

The said Kona Sugar Company Limited and F. L. Dortch as its receiver have no right, title or interest therein or thereto or any or to any part, and any purchaser at this or any other sale of the property of the Kona Sugar Company Limited will obtain no title therein or thereto or any or to any part thereof.

The said William W. Bierce Limited hereby protests against any sale or attempted sale of the said articles or any part thereof, and give notice that it will at once take legal steps to re-gain the possession of said property from any person or persons who shall take or attempt to take possession thereof or any part thereof or exercise or claim any right, title or interest of any sort therein or thereto.

William W. Bierce Limited,
By Kinney, McClanahan & Bigelow,
Its attorneys of Record.
By H. A. Bigelow
Its attorney-in-fact.

To C. J. Hutchins, Trustee

We hereby make demand upon you for the delivery and return to us forthwith of certain articles of railroad equipment lying in the possession and control of the Kona Sugar
291 Company Limited and F. L. Dortch as the Receiver of said Company. These articles are as follows, to-wit:

362 tons of steel T. Rails weighing 35 lbs. to the yd.
Joints for laying 550 tons of steel T. rails.
Railroad track spikes to lay 550 tons of said rails
10 sets of 35 split switch material, complete
16 cars 28 feet long, 7 feet wide and 3 feet gauge track
One 9x14 Class "A" saddle tank Locomotive
One 10x16 Class "M" back saddle tank Locomotive
One Howe Narrow gauge track scale, capacity 25 tons
One set re-railers
Four track gaugers, 3 feet
One rail bender
One track drill
One section car with seats
Two Jacks.

These said articles are our property and we demand the immediate return to us. We are holders of certain bonds of the Kona Sugar Company, Limited amounting to $36,000. which we will turn over to you upon the return to us of the said railroad equipment. A failure to accede to this demand will be regarded by us as a denial to our claim to said property, and we shall at once take steps to re-gain possession of the same.

William W. Bierce Limited
By H. A. Bigelow
Its attorney-in-fact.

Endorsed: Filed March 4, 1904. P. D. Kellett, Jr., Clerk.

292 The following exhibits which were offered in evidence on the trial of said cause by counsel for the plaintiff and which were received and read in evidence on said trial, and were marked for identification, and are in the words and figures following, to-wit:

EXHIBIT A

293-295 (Here follows the same instrument shown as Exhibit "A" and Plaintiff's Exhibit "G" on pages 289-291 of original transcript ante pp. 179-181 which to avoid reprinting is here omitted.)

296 Clerk's Minutes of February 5th, 1903, in the suit of M. W. McChesney & Sons vs. The Kona Sugar Company, Limited, et al.

In the Circuit Court, Third Circuit.

Territory of Hawaii.

McChesney & Sons
v.
The Kona Sugar Co., Ltd., et al., W. W. Bierce, Ltd.,
Intervenor.
} Dated, Feb. 5th, 1903

CLERK'S MINUTES.

H. A. Bigelow presents motion on behalf of W. W. Bierce, to issue an order allowing W. W. Bierce to join F. L. Dortch Receiver in an action of replevin against the Kona Sugar Co., Ltd., et al.

The motion is denied.

Feb. 26, 1903.

Motion for order allowing petition in intervention to be filed is granted.

Petition filed and summons issued March 20th, 1903, and returned March 28th, 1903, showing service.

March 30th, 1903.

Motion to join F. L. Dortch, Receiver, as party defendant to its petition filed February 26th is allowed.

Stipulation for appointment of Commissioner to take testimony in above entitled cause allowed and approved.

297 April 10, 1903.

Motion of W. W. Bierce, Intervenor, for appointment of commissioner to take depositions is allowed.

May 20th, 1903.

Stipulation extending time to answer filed.

Answer of Kona Sugar Co., Ltd., filed this 20th day of May.

May 30th, 1903.

Answer of Kapiolani Estate filed.

June 1st, 1903.

Motion presented by Alex. Lindsay on behalf of W. W. Bierce for order declaring sale of Kona Sugar Co., Ltd., to be no sale.

Motion overruled.

Exception to ruling.

June 5th, 1903.

Notice of appeal and appeal filed.

June 10th, 1903.

Bond on appeal filed.

(Signed) J. P. CURTS,
Clerk.

I hereby certify that the accompanying records herewith contain all the petitions, motions, notices, stipulations and orders, and that the foregoing minutes are a correct record of the proceedings in the matter of W. W. Bierce, Ltd., Intervenors in re McChesney vs. The Kona Sugar Co., Ltd., et al., and that together they constitute a complete record.

(Signed) J. P. CURTS,
Clerk.

298 The appeal bond of William W. Bierce, Limited, in the suit of M. W. McChesney & Sons vs. The Kona Sugar Company, Limited, et al.

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL DISTRICT.

Territory of Hawaii.

At Chambers. In Equity.

R. W. McChesney *et al.*,
Plaintiffs.
vs.
The Kona Sugar Co. Ltd., *et al.*,
Defendants.
William W. Bierce, Limited, *et al.*,
Intervenors.
}$1 stamp.

APPEAL BOND OF WILLIAM W. BIERCE LIMITED.

Know All Men By These Presents:

That William W. Bierce, Limited, a corporation, as principal and Chas. S. Dole as surety, are held and firmly bound to Henry Smith, Clerk of the Judiciary Department of the Territory of Hawaii and his successors in office, in the penal sum of Fifty Dollars ($50.00) to which sum well and truly to be paid the said principal and surety do hereby bind themselves, their respective successors and assigns, heirs, executors and administrators.

The conditions of this bond are as follows:

Whereas in the above cause brought in the Circuit Court of the Third Circuit at Chambers an order was made on the 1st day of June A. D. 1903 by the Honorable W. S. Edingd, Judge of the Circuit Court of the Third Circuit confirming the sale of the property of the Kona Sugar Company, Limited, defendant in the above cause, and

299 Whereas an appeal was noted from said order by William W. Bierce Limited above named principal, at the time of its being made, and the necessary costs having been paid to the Clerk of said Court, and

Now Therefore If Said appeal is perfected and all costs are paid, and if said William W. Bierce Limited, above named principal, pay all costs on appeal to the Supreme Court of the Territory of Hawaii, then and in such case this bond shall be null and void, otherwise to remain in full force and effect.

Dated at Honolulu T. H. this 9th day of June A. D. 1903.

(Signed) William W. Bierce Ltd.,
Principal.
By H. A. Bigelow,
Its Attorney in Fact.
Chas. S. Dole,
Surety.

(Endorsed): Filed June 10th, 1903 8 o'clock A. M. J. P. Curts Clerk.

300 The appeal of William W. Bierce, Limited, in the suit of M. W. McChesney & Sons vs. The Kona Sugar Company, Limited et al.

In the Circuit Court of the Third Judicial Circuit.

Territory of Hawaii.

At Chambers. In Equity.

R. W. McChesney *et al,* co-partners,
Plaintiffs.
The Kona Sugar Company, Limted,
Defendants.
William W. Bierce Limited and James A. Hopper Company, Limited.
Intervenors.

APPEAL.

Now comes William W. Bierce Limited, an intervenor in the above entitled cause and gives notice it its intention to appeal and does hereby appeal from the order of the Honorable W. S. Edings, Judge of the Circuit Court of the Third Judicial Circuit filed herein on June 1st 1903, confirming the sale of the property of the Kona Sugar Company, Limited, including its railroad, railroad equipment, locomotives, flat cars and cane cars to Clinton J. Hutchins, Trustee.

William W. Bierce Limited
By Kinney, McClanahan & Bigelow,
Its attorneys.

Dated Kailua, Island and Territory of Hawaii, June 5th A. D. 1903.

301 The Order Confirming Sale which was Filed and Entered of Record in Said Cause in the Circuit Court of the Third Judicial Circuit on the 1st day of June, 1903, and which is in Words and Figures as follows, to wit:

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT.

Territory of Hawaii.

M. W. McChesney & Sons
vs.
The Kona Sugar Company, Ltd., and the First American Savings and Trust Co., Ltd.

ORDER CONFIRMING SALE.

F. L. Dortch, Receiver of the Kona Sugar Company, Ltd., having duly made a return of his proceedings under and by virtue of a decree and order of sale made by this Court in the above entitled suit on the 9th day of May, 1903, and the same now coming on to be heard, due notice of said hearing having been given, and it having been proved to the satisfaction of this Court that notice of said sale was given as required by the Decree and order of sale aforesaid, and

That at the time and place of holding such sale specified in said notice, he sold at public auction to C. J. Hutchins, Trustee, he being the highest bidder, for the sum of Twelve Thousand Two Hundred and Fifty Dollars ($12,250) that being the highest sum bid, all and singular, the property described in said decree and order of sale and in said notice of sale.

302 That said sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, and that the interests of all parties to the said suit would and will be best conserved by the sale of the said property so made as aforesaid, and no good reason appearing why said sale should not be confirmed. It is hereby ordered, adjudged and decreed that the said sale be and the same is hereby confirmed, approved and declared valid, and the said F. L. Dortch, Receiver as aforesaid, is hereby authorized and directed to make, execute and deliver to the said purchaser any and all such instruments in writing

as may be necessary and proper to legally and effectually convey to and vest in the said purchaser all and singular the said property described in said order of sale and the notice of sale, and the right, title and interest of the said Kona Sugar Co., Ltd., and of said Receiver in and to the same, free and clear of incumbrances upon the compliance by the said purchaser with the terms and conditions of the order directing said sale.

And it is further ordered and decreed that the said Receiver, upon the payment of the remainder of the purchase price of said property, file in this Court his final report, showing specifically all amounts now due under the receivership of the Kona Sugar Co., Ltd., and to whom due, all amounts paid out by him and to whom paid. Also all sums received by him, and all sums now remaining in his hands undisbursed. Also all amounts now due him and by whom.

Done at Chambers this 1st day of June, A. D. 1903.

Endorsed
Filed June 1st, 1903.
J. P. CURTS, *Clerk.*

W. S. EDINGS
Circuit Judge of the Third Circuit, Territory of Hawaii

303 The order denying the motion of William W. Bierce, Limited, dated June 1st, 1903, in the suit of M. W. McChesney & Sons. vs. The Kona Sugar Company, Limited, et al.

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT.

Territory of Hawaii.

At Chambers. In Equity.

R. W. McChesney *et al.*, Copartners, *Plaintiffs.*
The Kona Sugar Company, Limited, *Defendants.*
William W. Bierce, Limited, and James A. Hopper Company, Limited, *Intervenors.*

Order denying motion of William W. Bierce, Company, Limited.

The motion of William W. Bierce Company, Limited, filed in the above cause May 30th, 1903, having come on to be heard this 1st day of June, 1903. It is hereby ordered that the said motion be and it hereby is denied pro forma.

Dated Kailua, Hawaii, (Signed) W. S. EDINGS,
June 1st, 1903. *Circuit Judge, 3d Circuit*
Territory of Hawaii

Endorsed:
Filed June 5th, 1903
8:30 o'clock, A. M.
J. P. CURTS, *Clerk.*

304 The motion of William W. Bierce, Limited, to which the affidavit of H. A. Bigelow is attached, sworn to May 29th, 1903, and the affidavit of William Kamaka, sworn to May 29, 1903, in the suit of M. W. McChesney & Sons vs. The Kona Sugar Company, Limited, et al.

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT.

Territory of Hawaii.

At Chambers. In Equity.

R. W. McChesney *et al.*, Copartners,
Plaintiffs.
The Kona Sugar Company, Limited,
Defendants.
William W. Bierce, Limited, and
James A. Hopper, Limited,
Intervenors.

MOTION.

Now comes William W. Bierce Limited, one of the intervenors in the above entitled cause, and moves this Honorable Court that it issue an order herein declaring the attempted sale of the property of the Kona Sugar Company, Limited, on May 9th, 1903, to be no sale, and that it refuse to allow and approve the same, and that the said Company and all its affairs, business, rights, titles and interest be declared to be in the same condition and plight as they were on April 15th A. D. 1903, and this said intervenor further objects and protests against the confirmation or approval of said aforementioned attempted sale.

This objection and motion are based upon the grounds
305 inter alia that under the order of sale made in the above entitled cause on April 20th 1903, the Receiver was ordered to sell and upon May 9th 1903, did in fact purport and attempt to sell among other things the "railroad equipment, locomotives, flat cars and cane cars," at that time in the possession and under the control of the said Kona Sugar Company, Limited, and its Receiver: that the said "railroad equipment, locomotives, flat cars and cane cars" have at all times been and still are the property of and belonging to this said intervenor William W. Bierce and to no other person or persons: that this court had no authority to direct the sale thereof and the receiver of said Kona Sugar Company, Limited, had no right to sell or purport to sell the same.

This motion and objection are based upon the records in the case and upon the affidavit of H. A. Bigelow hereto annexed and made a part hereof.

WILLIAM W. BIERCE, LIMITED.
By KINNEY, MCCLANAHAN & BIGELOW,
Its Attorneys.

H. A. B.

306 EXHIBIT "A."

Honolulu, Oahu, } ss.
Territory of Hawaii. }

H. A. BIGELOW, being duly sworn on oath says:

That he is one of the firm of Kinney, McClanahan & Bigelow, attorneys for William W. Bierce, Limited, intervenor in the above entitled cause, and is the attorney in fact of said intervenor: that said intervenor has at all times been and still is the absolute and sole owner of certain railroad equipment, locomotives, flat cars and cane cars, which are at the present time and have been for about two years last past in the possession and under the control of the Kona Sugar Company, Limited, or its Receiver: that the said property during all of said period has been used and enjoyed by the said Kona Sugar Company, Limited, and its Receivers, and that the said William W. Bierce, Limited, has received no compensation for the use of said property as aforesaid: that the use of said property has resulted in its necessary and material deterioration by exposure to the elements and the wear and tear of usage: that the said William W. Bierce, Limited, at the time the property of the Kona Sugar Company, Limited, was offered for sale under the order of this Honorable Court, to wit: on May 9th 1903, protested against the sale of said railroad equipment, cars, engines, etc., upon the ground inter alia that the property did not belong to the Kona Sugar Company, Limited, and could not be sold by it: that prior to said attempted sale the said William W. Bierce, Limited, had instituted proceedings to recover the possession of said railroad equipment and all parts thereof belonging to it which said suit is still pending before the Hon- 307 orable W. S. Edings, Judge of the Circuit Court of the Third Judicial Circuit in Chambers. That the confirmation of said sale would work a serious hardship and injustice to the said William W. Bierce, Limited, and would delay them in the recovery of their aforesaid property.

And further affiant sayeth not.

(Signed) H. A. Bigelow.

Subscribed and sworn to before me this 29th day of May, 1903.

Gussie H. Clark,
Notary Public First Judicial Circuit.

308 Honolulu, Oahu
Territory of Hawaii. } ss.

WILLIAM KAMAKA being duly sworn on oath says:

That he is the office boy in the office of Kinney, McClanahan & Bigelow: that on Friday forenoon May 29th 1903, he served copies of the foregoing motion upon J. M. McChesney, President of the Kona Sugar Company, Limited, and a member of the firm of M. W. McChesney & Sons; upon Smith & Lewis; upon Frank E. Thompson Esq.; upon C. W. Ashford, attorney for the Kapiolani Estate, Limited; upon the James A. Hopper Company, Limited, and upon the First American Savings and Trust Company, Limited, by leaving a copy thereof with each of the above.

And further affiant sayeth not.

(Signed) William Kamaka.

Subscribed and sworn to before me this 29th day of May A. D. 1903.

Gussie H. Clark,
Notary Public First Judicial Circuit.

Endorsed: Filed May 30th 1903. 9:00 o'clock A. M. J. P. Curts, Clerk. Kinney, McClanahan & Bigelow, Judd Building.

309 To R. W. McChesney et al., the Kona Sugar Company, Limited, L. Dortch, L. M. Whitehouse, James A. Hopper Company Limited, Kapiolani Estate Limited, First American Savings and Trust Co., Ltd., Eliza Roy, John D. Paris, Hannah Paris, W. H. Johnson, J. D. Johnson, W. H. Shipman and Caroline J. Robinson.

You and each of you will please take notice that upon Saturday May 30th, 1903, at 9:30 a. m. or as soon thereafter as we counsel may be heard, we shall present the foregoing motion to the Honorable W. S. Edings, Judge of the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, at Chambers in Equity and ask that the same be allowed.

(Signed) Kinney, McClanahan & Cooper,
Attorneys for the intervenor, William W. Bierce, Limited.

H. A. B.

310 The answer of the Kona Sugar Company, Limited, dated May 6th, 1903, in the suit of M. W. McChesney & Sons vs. The Kona Sugar Company, Limited, et al.

Circuit Court. Third Circuit.

Territory of Hawaii.

At Chambers. In Equity.

R. W. McChesney, *et al.*,
Plaintiffs,
vs.
The Kona Sugar Company *et al.*,
Defendants,
and
William W. Bierce, Limited, a Corporation.

ANSWER OF KONA SUGAR COMPANY, LIMITED.

The answer of the Kona Sugar Company, Limited, to the Bill of Complaint of the Intervenor, William W. Bierce, Limited, a corporation, shows to this Honorable Court as follows:

1st. Admits the allegations contained in paragraphs II, III, IV, V, VI, VII, VIII, IX, X and XI of said bill.

2nd. And said Kona Sugar Company, Limited, denies all other allegations of said Bill, except as hereinafter admitted, qualified or alleged.

3rd. And in that behalf said Kona Sugar Company, Limited, alleges that the so-called supplementary contract in writing alleged in the XIII paragraph of said Bill was made and executed without the authority of said Kona Sugar Company, Limited, and that the Kona Sugar Company, Limited, never agreed or consented to the same.

311 That thereafter and during the year 1902, the Intervenor waived all right or title to the articles set forth and described in Article XIV of said bill, and all rights it may have had in and under the supplementary contract aforesaid, and brought its suit against said Kona Sugar Company, Limited, in Assumpsit for the amount due on the note set forth in said bill of complaint in intervention.

That at all times such supplementary contract has been treated abd acted upon by said Intervenor and said Kona Sugar Company, Limited, as void and of no effect.

That said articles were sold absolutely and outright and delivered to said Kona Sugar Company, Limited, and the title thereto has been and now is in said Kona Sugar Company, Limited, and not otherwise, and the said Intervenor is not and has not been since said sale and delivery the owner of or entitled to the possession of said articles.

4th. Said Kona Sugar Company, Limited, admits that said note has not been paid, but alleges that the same is secured by bonds of said Kona Sugar Company, Limited, which are still held by said Intervenor.

Dated Honolulu, May 6, 1903.

KONA SUGAR COMPANY LTD.
By W. W. HALL,
its Vice President.

Territory of Hawaii }
Island of Oahu. } ss.

W. W. Hall, being duly sworn, says, that he is the Vice-President of said Kona Sugar Company, Limited, that he has read the foregoing answer, knows the contents thereof, and that the same are true to the best of his knowledge and belief.

(Signed) W. W. HALL.

Subscribed and sworn to before me this 6th day of May, A. D. 1903.

N. FERNANDEZ,
Notary Public.

Endorsed: Filed May 20, 1903. J. P. Curts, Clerk.

312 The stipulation dated April 8, 1903, in the suit of M. W. McChesney & Sons vs. The Kona Sugar Company, Limited, et al.

CIRCUIT COURT. THIRD DISTRICT.

Territory of Hawaii.

At Chambers. In Equity.

R. W. McChesney, *et al.*,
Plaintiffs,
v.
The Kona Sugar Co., Ltd., *et al.*,
Defendants.
and
William W. Bierce, Ltd.,
Intervenor.

STIPULATION.

It is hereby stipulated and agreed that the defendant, the Kona Sugar Co., Ltd., and the plaintiffs, R. W. McChesney, et al., may have to and including April 20th, 1903, to answer the petition of the intervenor, the William W. Bierce Co., Ltd., provided that the time to answer has not already expired.

Dated April 8, 1903.

(Signed) KINNEY, McCLANAHAN & BIGELOW,
per S. H. D.
Attorneys for Intervenor.

Time in above stipulation is extended to April 30, 1903.

(Signed) KINNEY, McCLANAHAN & BIGELOW,
H. A. B.
Attorneys for Intervenor.

Time in the above stipulation is hereby extended to May 6th, 1903.

(Signed) KINNEY, McCLANAHAN & BIGELOW,
Attorneys for Intervenor.

April 30, 1903.

Endorsed: Filed May 20th, 1903. J. P. Curts, Clerk.

313 The order of Court, dated April 10th, 1903, in the suit of M. W. McChesney & Sons vs. The Kona Sugar Company, Limited, et al.

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT.

Territory of Hawaii.

At Chambers. In Equity.

R. W. McChesney, J. M. McChesney and F. W. McChesney, carrying on a business under the bame of M. W. McChesney & Sons,
Plaintiffs,
vs.
Kona Sugar Company, Limited, *et al.*,
Defendants,
Kapiolani Estate, Limited, *et al.*,
Intervenors.

ORDER.

The motion of William W. Bierce, Ltd., Intervenor herein, for the appointment of a commissioner to take the depositions of Columbus Bierce and Harry T. Gilbert filed herein on April 1st, 1903, having come on to be heard it is hereby

Ordered: That the said motion be and it is hereby allowed.

Done at Chambers in Equity this 10th day of April, 1903, at Kailua, Island and Territory of Hawaii.

(Signed) W. S. EDINGS,
Judge of the Circuit Court of the Third Judicial Circuit.

Endorsed: Filed April 10th, 1903. J. P. Curts, Clerk.

314 The stipulation in the suit of M. W. McChesney & Sons vs. The Kona Sugar Company, Limited, et al., dated

March 30, 1903, bearing the approval of the court and signed by John W. Cathcart, attorney for McChesney & Sons, plaintiffs; by John D. Paris, Hannah Paris, Eliza Roy, W. H. Shipman, J. D. Johnson and W. H. Johnson, by Smith & Lewis, their attorneys; by Kapiolani Estate, Limited, by C. W. Ashford, its attorney; by First American Savings and Trust Company of Hawaii, Limited, by its President, Cecil Brown; by L. M. Whitehouse, by his attorneys, Kinney, McClanahan and Bigelow; and by James A. Hopper Company, Limited, by its attorneys, Kinney, McClanahan and Bigelow.

315 IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT.

Territory of Hawaii.

At Chambers. In Equity.

R. W. McChesney, J. M. McChesney and F. W. McChesney, carrying on a business under the name of M. W. McChesney & Sons,
Plaintiffs,
vs.
Kona Sugar Company, Limited, *et al.*,
Defendants,
Kapiolani Estate, Limited, *et al.*,
Intervenors.

STIPULATION.

It is hereby stipulated and agreed between R. W. McChesney and J. M. McChesney, surviving partners of the firm of M. W. McChesney & Sons, the Kona Sugar Company, Limited, The First American Savings & Trust Company of Hawaii, the Kapiolani Estate, Limited, L. M. Whitehouse, James A. Hopper & Company, Limited, John D. Paris, Hannah Paris, Eliza Roy, W. H. Shipman, J. D. Johnson and W. H. Johnson and William W. Bierce, Limited, that with the consent of this Honorable Court, Ralph C. Shaw, Esq., of Chicago, Illinois, may be appointed a Commissioner to take the testimony of Columbus Bierce and Harry T. Gilbert, witnesses for William W. Bierce, Limited, Intervenor and petitioner herein, upon interrogatories, cross-interrogatories and redirect-
316 interrogatories; that the said William W. Bierce, Limited, shall file the original of its proposed interrogatories with

Henry Smith, Clerk of the Supreme Court of the Territory of Hawaii, and shall serve a copy thereof upon the parties hereto; that the said parties shall have seven (7) days after the service upon them of a copy of the aforesaid proposed interrogatories within which to file with the said Henry Smith any cross-interrogatories that they may desire to propound to the said witnesses or either of them; that the said William W. Bierce, Limited may have three (3) days after the service upon it of a copy of such cross-interrogatories in which to file with the said Henry Smith redirect interrogatories; that all such interrogatories, cross-interrogatories and redirect interrogatories shall then be forwarded by the said Henry Smith to Ralph C. Shaw, Esq. Monadnock Building, Chicago, Illinois, as commissioner to examine the said Columbus Bierce and Harry T. Gilbert upon the same; that in the event of the said Ralph C. Shaw being unable for any reason to act as Commissioner herein, the examination upon the said interrogatories, cross-interrogatories and redirect-interrogatories, if any, may be taken before any clerk of any Court of record in Cook County, State of Illinois, said clerk to be appointed by the said Ralph C. Shaw; that the said Ralph C. Shaw or any clerk appointed by him as aforesaid to act in his stead, shall examine the said witnesses upon the said interrogatories, cross-interrogatories and redirect interrogatories, if any, and shall return the same with the answers thereto to J. P. Curts, Clerk of the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, together with a certificate that the same have been duly taken and answered before him; and that upon the return of the said interrogatories, cross-interrogatories
317 and redirect-interrogatories, if any, together with the answers thereto duly certified to by the Commissioner taking the same as aforesaid, the said interrogatories, cross-interrogatories and redirect-interrogatories together with the answers made thereto, may be read in evidence in any trial of the above named cause with same force and effect and subject to the same objections (saving as to the manner of taking same) as if the said parties were personally present and testifying in Court.

That the individual to act as the Commissioner to examine the said witnesses as aforesaid, the person with whom the said interrogatories, cross-interrogatories and redirect-interrogatories shall be filed as aforesaid and any other details as to the method of taking the said examination may be altered by the Honorable W. S. Edings, Judge of the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, without affecting this stipulation, provided however that the length of time within which the parties hereto may be entitled to file their cross-interrogatories as aforesaid, shall not be diminished.

(Signed)
JOHN W. CATHCART,
Attorney for McChesney & Sons, Plaintiffs.
JOHN D. PARIS,
HANNAH PARIS,
W. H. SHIPMAN,
J. D. JOHNSON,
W. H. JOHNSON,
By SMITH & LEWIS,
their Attorneys.
KAPIOLANI ESTATE, LTD.,
By C. W. ASHFORD,
Its Attorney.
318 THE FIRST AMERICAN SAVINGS & TRUST
CO. OF HAWAII, LTD.,
By its President,
CECIL BROWN,
L. M. WHITEHOUSE,
By his attorneys,
KINNEY, McCLANAHAN & BIGELOW.
H. A. B.
JAMES A. HOPPER CO., LTD.,
By its Attorneys,
KINNEY, McCLANAHAN & BIGELOW.
H. A. B.

The foregoing stipulation is hereby approved and allowed this 30th day of March, A. D. 1903.

W. S. EDINGS,
Circuit Judge of the Circuit Court of the Third Judicial Circuit.

Endorsed: Filed April 1, 1903. J. P. Curts, Clerk.

319 The motion of William W. Bierce, Limited, in the suit of M. W. McChesney & Sons vs. The Kona Sugar Company, Limited, et al. with the affidavit thereto attached of H. A. Bigelow sworn to March 27th, 1903, and the affidavit thereto attached of S. H. Derby, sworn to March 27th, 1903.

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT.

Territory of Hawaii.

At Chambers. In Equity.

R. W. McChesney, J. M. McChesney and F. W. McChesney, carrying on a business under the name of M. W. McChesney & Sons,
Plaintiffs,
vs.
Kona Sugar Company, Limited, *et al.,*
Defendants,
Kapiolani Estate, Limited, *et al.,*
Intervenors.

MOTION.

Now comes William W. Bierce, Limited, Intervenor herein and moves this Honorable Court that it issue a commission for the examination by interrogatories of Columbus Bierce and Harry Gilbert, witnesses for this intervenor in the above entitled cause; that the said commission be issued to Ralph C. Shaw, Esq., Monadnock Building, Chicago, Illinois, directing him to take the testimony of the said Columbus Bierce and Harry T. Gilbert at such time and place as he, the said Shaw, shall appoint and authorizing him to adjourn the examination of the said witness from day to day as shall be necessary in order to complete the same and authorizing and directing him,
after completing all examinations, whether upon direct
320 interrogatories, cross-interrogatories or redirect-inter-
rogatories to return the same duly certified as having been taken and answered before him to J. P. Curts, Clerk of the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, at Kailua, Hawaii. in said Territory, and further authorizing and directing him, the said Ralph C. Shaw, in the event of his being unable, for any reason, to make the examination of the said witnesses, that he shall appoint some clerk of any court of record in Cook County, State of Illinois, to make the examination of said witnesses with the same force and effect and as fully and completely as if he, the said clerk had been herein specifically named and appointed, and giving the said clerk the same powers and duties as to taking, record-

ing, certifying and returning the said interrogatories, cross-interrogatories and redirect-interrogatories, if any, that are given to and required of the said Ralph C. Shaw, Esq.

And further that your Honor will order that the said William W. Bierce, Limited, shall file the original copy of the interrogatories proposed by it with Henry Smith, Clerk of the Supreme Court of the Territory of Hawaii and serve copies thereof upon the other parties hereto; that the said other parties hereto, after service as aforesaid, may have seven days within which to file with the said Henry Smith their cross interrogatories and that the said William W. Bierce, Limited, may have three days after the service of a copy of such cross interrogatories in which to file with the said Henry Smith redirect-interrogatories, all of which are to be forwarded by the said Henry Smith to the said Ralph C. Shaw, Esq., commissioner as aforesaid.

This motion is based upon the records in the case and upon the affidavit of H. A. Bigelow hereto annexed and made a part hereof.

WILLIAM W. BIERCE, LIMITED,
By its Attorneys,
KINNEY, MCCLANAHAN & BIGELOW.
H. A. B.

321 Territory of Hawaii } ss.
Honolulu, Oahu. }

H. A. Bigelow, being duly sworn on oath deposes and says:

That he is a member of the firm of Kinney, McClanahan & Bigelow, attorneys for William W. Bierce, Limited, intervenor herein; that Columbus Bierce and Harry T. Gilbert are important and material witnesses for the said intervenor, and that they reside outside of the jurisdiction of this court, to wit: in the City of Chicago, Cook County, State of Illinois; that the testimony that the said witnesses would give on behalf of the intervenor herein, is so important and material that it would be a hardship to this intervenor and would not be possible for this intervenor to go to trial upon its petition herein without the evidence of said witnesses.

That the said Columbus Bierce will testify among other things to the following: that he is and has been for several years last past, the Vice-President of William W. Bierce, Limited, and as such, has had charge of its various dealings with the Kona Sugar Company, Limited, relative to the rails,

engines, cars and other railroad equipment mentioned in this intervenor's petition and sought to be recovered therein, and that he is familiar with the facts in regard to said transactions; that about February 21st, 1900, the said William W. Bierce, Limited, agreed to furnish the said Kona Sugar Company, Limited, the said railroad equipment, for which the said
Kona Sugar Company, Limited, agreed in writing to pay
322 in cash upon presentation of a demand draft attached to
the bill of lading: that he is familiar with the handwriting of Frank Davies whose name appears as having signed said contract for the said William W. Bierce, Limited: that the words Frank Davies written at the end of said contract are the signature of the said Frank Davies: that he was at that time duly authorized to act for the said William W. Bierce, Limited: that the said William W. Bierce, Limited, proceeded to ship the said articles contracted for to said Honolulu: that upon shipment a demand was made for the payment of the price by the said Kona Sugar Company, Limited, as agreed upon: that they neglected and refused to pay the price or any part thereof; that because of this failure, the said railroad equipment and goods were not delivered to the said Kona Sugar Company, Limited upon their arrival in Honolulu, nor was the title to said goods, or the right of property thereof, or any part thereof transferred from the said William W. Bierce, Limited: that thereafter various correspondence passed between the Bierce and the Kona Company relative to these goods and various conversations were had between the Bierce Company and a representative of the Kona Company, the exact words of which conversations and letters this affiant cannot state, but he is informed and believes and so alleges that the same were substantially to the effect that the Kona Sugar Company, Limited, desired to take possession of said goods and agreed that the right thereof and all interest therein should remain in the said Bierce Company: that thereafter Harry T. Gilbert was sent to Honolulu to straighten out this affair; that he had full authority to act for the Bierce Company; that said Columbus knows the
signature of Harry T. Gilbert, and that it is his signa-
323 ture which appears at the end of the letter dated March
13th, 1901, (a copy of which is annexed to the petitioner's complaint herein as exhibit "B"): that the note mentioned in said letter for Thirty Seven Thousand and Forty Four and 53/100 Dollars ($37,044.53) was given by the said Kona Sugar Company, to the said William W. Bierce, but

the said note has not been paid, nor has any part thereof been paid, and the whole amount thereof is now due and owing: that in accordance with said contract the Bierce Company allowed the said Kona Sugar Company, Limited, to take possession of the said railroad equipment; that the said Bierce Company did not intend to waive or surrender thereby any rights of ownership, or of possession in and to said property, or any part thereof, and did not in fact so do; that they merely permitted the Kona Sugar Company, Limited, to take and use the same.

That at no time prior to January 1903, did the said Columbus Bierce, or the said William W. Bierce, Limited, have any knowledge or belief, or any suggestion or intimation of any kind whatsoever, that the railroad of the said Kona Sugar Company, Limited, was on land in which the said Kona Sugar Company, Limited, had neither a fee simple nor a leasehold interest, but that on the contrary, the said William W. Bierce Limited, believed fully that the said railroad was built and ran over lands owned by the said Kona Sugar Company, Limited, either in fee simple or in leasehold: that had the said William W. Bierce known or had any reason to believe that such was not the case, they would not have permitted the said railroad equipment, or any part thereof, pass into the possession of the said Kona Sugar Company, 324 Limited, nor would they have allowed lien proceedings or any proceedings of any nature whatsoever except for a direct recovery of possession of the property to have been instituted against the said Kona Sugar Company, Limited: that as soon as the said Bierce Company became aware or had any understanding that the railroad of the said Kona Sugar Company, ran for the most part over land in which it had neither a fee simple or a leasehold interest, they at once directed a revocation and discontinuance of said proceeding; that they have not intended to waive nor have they in fact waived any right to the title and possession of the aforesaid property, but have at all times asserted and do still assert the right of title and right to possession thereof: that he is familiar with the value of railroad equipment, and that the loss and necessary wear and tear upon the said railroad equipment sought to be recovered in this petition is such, that the value of said property at the present time has greatly deteriorated, and that the said Bierce Company will have suffered heavy loss through the use thereof by the said Kona Sugar Company Limited.

That the said Harry T. Gilbert will testify among other things as follows:

That it is his signature on the letter of March 13th 1901, referred to in plaintiff's petition and annexed to the said petition herein as exhibit "B"; that he acted in said matter on behalf of William W. Bierce Limited.

H. A. Bigelow.

Subscribed and sworn to before me this 27th day of March A. D., 1903.

Gussie H. Clark,
Notary Public First Judicial Circuit.

325 Territory of Hawaii }
Honolulu, Oahu. } ss.

S. H. DERBY, being duly sworn on oath says:

That he is an attorney-at-law and practicing law in the city of Honolulu and at present practicing in the offices of Kinney, McClanahan & Bigelow: that upon Friday March 27th, 1903, he served copies of the foregoing motion, as follows:

Upon M. W. McChesney & Sons, by leaving a copy thereof with J. M. McChesney, a member of said firm; upon the Kona Sugar Company, Limited, by leaving a copy thereof with J. M. McChesney, President of the said Company: upon the First American Savings & Trust Company of Hawaii, Limited, by leaving a copy thereof with W. G. Cooper, the Cashier of said Company: upon the Kapiolani Estate Limited, by leaving a copy thereof with C. W. Ashford, its attorney; upon Hannah Paris, Eliza Roy, W. H. Shipman, J. D. Johnson, W. H. Johnson, Caroline J. Robinson and J. D. Paris, by leaving a copy thereof with their attorneys, Smith and Lewis.

(Signed) S. H. Derby.

Subscribed and sworn to before me this 27th day of March A. D., 1903.

Gussie H. Clark,
Notary Public First Judicial Circuit.

Endorsed: Filed April 1, 1903. 10:45 o'clock A. M. J. P. Curts, Clerk.

326 Please take notice upon Tuesday, March 31st, 1903, at 10 o'clock A. M. or as soon thereafter as we can be heard, we shall present the foregoing motion to the Honorable W.

S. Edings, Judge of the Circuit Court of the Third Judicial Circuit at the Court House at Kailua, Hawaii, and ask that the same be allowed.

KINNEY, MCCLANAHAN & BIGELOW,
Attorneys for William W. Bierce, Limited.

327 The order of court, dated March 30th, 1903, in the suit of M. W. McChesney & Sons vs. The Kona Sugar Company, Limited, et al.

CIRCUIT COURT, THIRD CIRCUIT.

W. M. McChesney
vs.
Kona Sugar Co., *et al.*,
Defendants.
Kapiolani Estate, *et al.*,
Intervenors.

ORDER.

Upon hearing the motion of W. W. Bierce, Ltd., intervenor herein, that it be allowed to join F. L. Dortch, Receiver of the Kona Sugar Co., Ltd., as a defendant in its petition filed February 26, 1903, wherein it asks to be allowed to resume possession of certain rails, cars and other railroad equipment now in the possession of the said Kona Sugar Co., Ltd., and F. L. Dortch, it is hereby ordered that the said motion be and it is hereby allowed and the said intervenor is hereby allowed to join F. L. Dortch, Receiver of the said Company, as a party defendant in its said petition.

(Signed) W. S. EDINGS,
Circuit Judge, Third Circuit, Ty. of Hawaii.

Kailua, Haw. Mch. 30th, 1903.

Endorsed: Filed March 30th, 1903. J. P. Curts, Clerk.

328 The motion of William W. Bierce, Limited, and acknowledgement of service of copy thereof, dated March 26th, 1903, in the suit of M. W. McChesney & Sons vs. The Kona Sugar Company, Limited, et al.

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT

Territory of Hawaii.

At Chambers. In Equity.

R. W. McChesney, J. M. McChesney and F. W. McChesney, carrying on a business under the name of M. W. McChesney & Sons,
Plaintiffs,
vs.
The Kona Sugar Company, Limited, *et al.,*
Defendants,
Kapialoni Estate, Limited *et al.,*
Intervenors.

MOTION.

Now comes William W. Bierce, Limited, Intervenor herein, and moves this court that it be allowed to join F. L. Dortch, Receiver of the Kona Sugar Company, Limited, as a party defendant to its petition filed herein on February 26th, 1903, wherein it asks to be allowed to resume possession of certain rails, cars, engines and other railroad equipment now in the possession of the Kona Sugar Company, Limited and F. L. Dortch as Receiver thereof.

This motion is based upon the records in the case.

WILLIAM W. BIERCE, LIMITED,
By its Attorneys
KINNEY, MCCLANAHAN & BIGELOW
H. A. B.

NOTICE.

To R. W. McChesney and J. M. McChesney, surviving partners of the firm of M. W. McChesney & Sons,

329 To the Kona Sugar Company, Limited and F. L. Dortch, Receiver of said Company,

To the First American Savings and Trust Company of Hawaii, Limited, the Kapiolani Estate, Limited, L. M. Whitehouse, James A. Hopper & Co. Ltd., Hannah Paris, Eliza

Roy, W. H. Shipman, J. D. Johnson, W. H. Johnson, Caroline J. Robinson, and John D. Paris:—

You and each of you will please taken notice that we shall present the foregoing motion to the Hon. W. S. Edings upon Saturday, March 28, 1903, at 10 A. M. or as soon thereafter as we can be heard, at the Court room of the Circuit Court of the Third Judicial Circuit at Kailua, Hawaii.

W. W. BIERCE, LIMITED,
By its attorneys,
KINNEY, McCLANAHAN & BIGELOW
H. A. B.

The service of the foregoing motion is hereby acknowledged this 26th day of March, 1903.

M. W. McCHESNEY & SONS,
By JNO. W. CATHCART,
Attorney.

KONA SUGAR COMPANY, LIMITED,
By ....

FIRST AMERICAN SAVINGS AND TRUST COMPANY OF HAWAII
By CECIL BROWN
Its President.

KAPIOLANI ESTATE LIMITED,
By C. W. ASHFORD
its Attorney.

L. M. WHITEHOUSE,
By its Attorneys
KINNEY, McCLANAHAN & BIGELOW,
H. A. B.

JAMES A. HOPPER CO. LTD.
By its Attorneys
KINNEY, McCLANAHAN & BIGELOW,
H. A. B.

HANNAH PARIS, ELIZA ROY, W. H. SHIPMAN, J. D. JOHNSON, W. H. JOHNSON, CAROLINE J. ROBINSON and JOHN D. PARIS,
By their Attorneys
SMITH & LEWIS.

330 Territory of Hawaii } ss:
Honolulu, Oahu }

William C. B. Kamaka, being duly sworn on oath says: that he is office boy in the Office of Kinney, McClanahan & Bigelow: that on March 27th, 1903, at 10:30 a. m. he served a copy of the foregoing motion upon the Kona Sugar Company, Limited, by leaving it with J. M. McChesney, President of the Kona Sugar Company, Limited.

(Sig.) William C. B. Kamaka,

Subscribed and sworn to before me this 27th day of March A. D. 1903.

(Sig.) Gussie H. Clark,

(Seal) *Notary Public, First Judicial Circuit.*

(Endorsed): Motion, Filed, March 30th, 1903. J. P. Curts, Clerk.

331 The notice, dated February 12th, 1903, in the suit of M. W. McChesney & Sons vs. The Kona Sugar Company, Limited, et al.

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT
Territory of Hawaii.
At Chambers. In Equity.

R. W. McChesney, J. M. McChesney and F. W. McChensney, carrying on business under the name of M. W. McChesney & Sons,
Plaintiffs.
vs.
The Kona Sugar Company, Limited, a corporation, and The First American Savings and Trust Company of Hawaii, Limited, a corporation,
Defendants,
Kapiolani Estate, Limited, L. M. Whitehouse, J. D. Paris, Hannah Paris, Eliza Roy, W. H. Shipman, J. D. Johnson and W. H. Johnson,
Intervenors.
and
William W. Bierce, Limited, a corporation.
Intervenor.

NOTICE.

To R. W. McChesney and J. M. McChesney, surviving 332 partners of the firm of M. W. McChesney & Sons, the Kona Sugar Company, Limited, The First American Savings and Trust Company of Hawaii Limited, Kapiolani Estate Limited, L. M. Whitehouse, J. D. Paris Hannah Paris, Eliza Roy, W. H. Shipman, J. D. Johnson and W. H. Johnson.

You and each of you will please take notice that on Monday, the 16th day of February, 1903, at 10 o'clock A. M., or as soon thereafter as we can be heard, we shall present the annexed motion and petition at the court room of the above entitled Court at Kaiula, Hawaii.

WILLIAM W. BIERCE, LIMITED,
By KINNEY, McCLANAHAN & BIGELOW
H. A. B.
Its Attorneys.

Dated at Honolulu this 12th day of February, 1903.

Endorsed: Notice, Filed February 26th, 1903. J. P. Curts Clerk.

333 The motion, dated February 12th, 1903, and the order of court granting said motion, dated February 26th, 1903, in the suit of M. W. McChesney & Sons vs. The Kona Sugar Co. Lt'd. et al.

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT

Territory of Hawaii.

At Chambers. In Equity.

R. W. McChesney, J. M. McChesney and F. W. McChesney, carrying on business under the name of M. W. McChesney & Sons,
Plaintiffs.
vs.
The Kona Sugar Company, Limited, a corporation, and The First American Savings and Trust Company of Hawaii, Limited, a corporation,
Defendants.
Kapiolani Estate, Limited, L. M. Whitehouse, J. D. Paris, Hannah Paris, Eliza Roy, W. H. Shipman, J. D. Johnson and W. H. Johnson,
Intervenors.
and
William W. Bierce, Limited, a corporation.
Intervenor.

MOTION.

Now comes William W. Bierce, Limited, a corporation, 334 by its attorneys, Kinney, McClanahan and Bigelow, and move this Honorable Court that it issue an order allowing its petition in intervention to be filed, a copy of said petition being hereto annexed.

This motion is based on all the papers, records and files in the above entitled cause and upon the petition hereto annexed to all of which reference is hereby made, and the same are made a part hereof.

Honolulu, February 12th, 1903.

WILLIAM W. BIERCE, LIMITED,
By KINNEY, MCCLANAHAN & BIGELOW
H. A. B.
Its Attorneys.

The above motion is hereby granted.

W. S. EDINGS
Circuit Judge.

Kailua Hawaii, February 26th, 1903.
Filed February 26th, 1903. J. P. Curts, Clerk.

335 The motion dated February 3d 1903, in the suit of M. W. McChesney & Sons vs. The Kona Sugar Company Limited, et al.

CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT,

Territory of Hawaii

April 1903 Term.

William W. Bierce, Ltd., a corporation,
Plaintiff,
vs.
The Kona Sugar Co. Ltd., a corporation and F. L. Dortch, Receiver of the Kona Sugar Co. Ltd.,
Defendants.
} Replevin.

Motion.

Now comes William W. Bierce Ltd. by its attorneys, Kinney, McClanahan & Bigelow and moves this Honorable Court that it issue an order allowing the said plaintiff to join in an action of Replevin against the Kona Sugar Co. Ltd. F. L. Dortch, Esq., the Receiver of said Company. This motion is based upon the records of the case and upon the facts set forth in the Bill of Complaint desired to be filed, which said Bill of Complaint is hereby referred to and made a part hereof in support of this motion.

WILLIAM W. BIERCE LTD.,
by its Attys. KINNEY, MCCLANAHAN & BIGELOW

Dated, Honolulu, February 3, 1903.

To the Kona Sugar Co. Ltd. and F. L. Dortch, Receiver of said Company:—

You and each of you will please take notice that upon Thursday February 5th, A. D. 1903 at ten o'clock A. M. or
336 as soon thereafter as counsel may be heard that we shall present the foregoing motion to the Honorable W. S. Edings, Judge of the Circuit Court of the Third Judicial Circuit, and ask that the same be allowed.

William W. Bierce, Ltd.,
by its Attys. Kinney, McClanahan & Bigelow.

(Endorsed): Filed, February 4th, 1903. J. P. Curts, Clerk.

337 The order of court of February 5th, 1903, denying the petition of William W. Bierce, Limited, for leave to bring a statutory action of replevin against the receiver in the suit of M. W. McChesney & Sons vs. the Kona Sugar Company, Limited, et al.

In the Circuit Court of the Third Circuit,

Territory of Hawaii

In Equity. At Chambers.

William W. Bierce Ld., A Corporation
vs.
The Kona Sugar Co. Ld. A Corporation and F. L. Dortch, Receiver.

Order.

This is a motion on the part of the plaintiffs to be permitted to join F. L. Dortch, Receiver of the Defendant corporation as a defendant in an action of Replevin.—wherein plaintiff seeks to recover possession of a certain railway, its rolling stock, and equipments alleged to be in the possession of the receiver and wrongfully detained from the plaintiff.

From the records in the cause of M. W. McChesney & Sons v. the Kona Sugar Co. Ld. and the First American Savings and Trust Company of Hawaii, Ld., in which cause the said receiver was appointed; now on file in this Court. It appears that the said plaintiff heretofore filed a materialman's lien upon the said railway & C. and the land upon which the same is situate, and upon permission being granted by this court filed a petition of intervention in said cause for the enforcement of said lien and afterwards filed a motion for a discontinuance of its the plaintiff's lien and suit. That since the appointment of said Receiver materialmen's liens have been filed by divers parties against the said property and suits instituted for their enforcement and which suits are now pending. That the Defendant the First American Savings and Trust Co. of Hawaii, Ld., has filed its answer in said cause alleging among other things that it is 338 the mortgagee or Trustee in a certain mortgage for $200,000. executed by the Defendant corporation, The Kona Sugar Co. Ld., conveying all and singular all of the property and effects of the said Kona Sugar Co. Ld. to secure said indebtedness, and praying that a decree of foreclosure issue out of this Court upon said property.

From the above facts, a knowledge of which plaintiff is presumed to have had it being a party to the cause at its intervention, I am of the opinion, without passing upon the necessity of making the said parties, parties to the action of Replevin, or any of the questions involved in the justice of hardship of permitting the action, that the said parties should have had notice of said motion and been permitted an opportunity to have been heard thereon.

The mere fact of granting the motion is sufficient to divest the receiver of the possession of the property and to vest the possession of the same in the plaintiff—now is the fact that the plaintiff tendered a bond to the Kona Sugar Co. Ld., sufficient to warrant an ex-parte proceeding in the premises. As the said parties appear not to have had notice of the said motion and the hearing—The said motion is denied—.

(Signed) W. S. Edings
Circuit Judge.

Kailua, Hawaii,
February 5th, 1903.

(Endorsed): Filed, Feb. 5th, 1903. J. P. Curts, Clerk.

339 The intervening petition of William W. Bierce, Limited, dated February 12, 1903, in the suit of M. W. McChesney & Sons vs. The Kona Sugar Company, Limited, et al.

In the Circuit Court of the Third Judicial Circuit,

Territory of Hawaii.

At Chambers. In Equity.

———ooo———

R. W. McChesney, J. M. McChesney and F. W. McChesney, carrying on business under the name of M. W. McChesney & Sons,
Plaintiffs.
vs.
The Kona Sugar Company, Limited, a corporation, and The First American Savings and Trust Company of Hawaii, Limited, a corporation
Defendants.
} (Stamps)

Kapiolani Estate Limited, L. M. Whitehouse, J. D. Paris, Hannah Paris, Eliza Roy, W. H. Shipman, J. D. Johnson and W. H. Johnson,
Intervenors.
and
William W. Bierce Limited, a corporation.
Intervenor.

Petition of William W. Bierce, Limited, in Intervention.

340 To the Honorable W. S. Edings, Judge of the Circuit Court of the Third Judicial Circuit, Territory of Hawaii.

Now comes William W. Bierce, Limited, petitioner in intervention herein, and respectively shows:—

I.

That it is a corporation organized and existing under and by virtue of the laws of the State of Louisiana, and having its principal place of business in New Orleans, in that State.

II.

That McChesney & Sons are a co-partnership, having their principal place of business in Honolulu, Territory of Hawaii, and conducting a general mercantile business in said Territory.

III.

That the Kons Sugar Co. L'td., is a corporation duly organized and existing under the laws of the Territory of Hawaii, and having its principal place of business in Kona, Island and Territory of Hawaii; that the First American Savings & Trust Co. L'td. is a corporation organized and existing under the laws of the Territory of Hawaii, and having its principal place of business in Honolulu, in said Territory; that the Kapiolani Estate Limited, is a corporation duly organized and existing under the laws of the Territory of Hawaii, and having its principal place of business in Honolulu, in said Territory.

IV.

That J. D. Paris, Hannah Paris, Eliza Roy, W. H. Shipman, J. D. Johnson and W. H. Johnson, are, and each of them is, residents of the Island and Territory of Hawaii.

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V.

That L. M. Whitehouse is a resident of the Island and Territory of Hawaii.

VI.

That the said M. W. McChesney & Sons did on or about the 28th day of March 1902, file its bill in equity herein against the said the Kona Sugar Company, Limited, defendant herein, wherein it was shown, inter alia, that the said Company was without funds to carry on its business and harvest its crop; that the wages of laborers and other servants were unpaid, and that the said company was neglecting to harvest its crop, and to pay the rents of lands held by it under lease, and that the lessors were threatening to take proceedings to recover possession of said land; that the said crop of sugar of the value of Two Hundred Thousand Dollars ($200,000.) and other property of said The Kona Sugar Company, Limited, was in immediate danger of being lost, injured, destroyed or wasted, and for such reasons prayed that a receiver of said property be appointed.

VII.

That the said The First American Savings and Trust Company of Hawaii, Limited, defendant herein, is the trustee under a deed of trust made by said Kona Sugar Company, Limited, whereby all of its property was conveyed to said First American Savings and Trust Company of Hawaii, Limited, to secure the payment of its bonds in the amount of Two Hundred Thousand Dollars, ($200,000.) and interest thereon. That the said First American Savings and Trust Company of Hawaii, Limited, appeared at the hearing of said bill and joined in the prayer of said petition asking for the appointment of a receiver and consented thereto.

VIII.

That on the 28th day of March 1902, this Court by an order given or made, appointed M. F. Scott a receiver of all the property of said The Kona Sugar Company, Limited, and authorized and directed said receiver "to take into his possession and control ° ° ° all the property, real, personal and mixed of said defendants the Kona Sugar Company, Limited, a corporation forthwith, and to direct, carry on and prosecute the business of said The Kona Sugar Company, Limited, a corporation, under the direction of this court sitting in equity at chambers as shall from time to time be ordered."

IX.

That said M. F. Scott continued to act as the receiver of said company until November 5th 1902, when this Honorable Court removed the said M. F. Scott and appointed F. L. Dortch receiver of said property: that the said F. L. Dortch has continued to be from said date and now is the receiver of the aforesaid Company.

X.

That on or about February 21, 1900, the said William W. Bierce Ltd. agreed to furnish to the Kona Sugar Co., Ltd. certain rails, engines, cars and other goods and merchandise for use on the plantation of the said Kona Sugar Co. in the District of Kona, Island and Territory of Hawaii, at prices specified in said contract, which the said Kona Sugar Co. Ltd. agreed in writing to pay in cash upon the presentation of a demand draft attached to the bill of lading issued by the initial railroad, showing said goods and merchandise to have been shipped through to Honolulu.

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XI.

That in pursuance of said contract to said William W. Bierce Ltd. proceeded to ship the articles mentioned in said contract to Honolulu, Territory of Hawaii; that upon shipment of said goods and merchandise demand was made upon the said Kona Sugar Co. Ltd. for the payment of the price thereof, in accordance with the terms of said contract before mentioned.

XII.

That the said Kona Sugar Co. Ltd. neglected and refused to pay the said price or any part thereof; that because of this failure upon the part of the said Kona Sugar Co. Ltd. to pay the price as agreed upon the said goods were not, nor was any part thereof, upon their arrival at Honolulu, or at any other time save as hereinafter stated, delivered to the said Kona Sugar Co. Ltd., nor was the title to said goods or the right of property therein or the title or right of property of or in any part thereof ever transferred or taken from the said William W. Bierce, Ltd., but that the said William W. Bierce, Ltd. retained both title and possession of said goods and each and all thereof and refused to permit them or any of them to pass into the possession of the said Kona Sugar Co. Ltd. nor did they or any of them in fact pass into the possession of the said Kona Sugar Co. Ltd.

XIII.

That thereafter, to-wit, on or about March 13, 1901, a supplementary contract in writing was entered into between the said William W. Bierce Ltd. and the said Kona Sugar Co. Ltd. whereby the said William W. Bierce Ltd. offered in writing to permit the said Kona Sugar Co. Ltd. to take possession of
the said rails, engines, cars and other merchandise and
344 use the same upon the payment of Ten Thousand (10,000)
Dollars gold coin to the said William W. Bierce, Ltd. and the execution of a promissory note by the said Kona Sugar Co., Ltd. to the said William W. Bierce Ltd. for $37,044.53, payable six months from date, upon the express understanding and agreement that the said goods and merchandise should not become the property of the said Kona Sugar Co. Ltd. until the payment of the said note, which said offer and each and all of the conditions thereof was accepted in writing by the said Kona Sugar Co. Ltd. upon March 13, 1901, and a promissory note for $37044.53, payable six months after date to the order of William W. Bierce Ltd. was duly executed and delivered by the said Kona Sugar Co. Ltd. to the said William W. Bierce Ltd. Copies of said contract and note marked respectively Exhibit "A" and Exhibit "B" are hereto attached and made a part hereof.

XIV.

That thereafter, in accordance with the terms of said supplementary contract and not otherwise, the said William W. Bierce Ltd. permitted the said Kona Sugar Co. Ltd, to take possession of and the said Kona Sugar Co. Ltd. did in fact take possession of the following articles, to-wit:—

362 tons of steel T rails weighing 35 lbs. to the yd.
Joints for laying 550 tons of steel T rails
Railroad tract spikes to lay 550 tons of said rails
10 sets of 35 lb. split switch material, complete
16 cars 28 feet lon, 7 ft. wide for 3 ft. gauge track
One 9 x 14 Class "A" saddle tank Locomotive
One 10 x 16 Class "M" back saddle tank Locomotive
One Howe Narrow Gauge track scale, capacity 25 tons
One set re-railers
Four track gaugers, 3 feet
One rail bender

One track drill
One section car with seats
Two Jacks,

345 which said rails, cars, engines and other merchandise as above enumerated were then and continued to be the property of the said William W. Bierce Ltd.

XV.

That the said Kona Sugar Co. Ltd. did not upon September 13, 1901, said date being six months from the date of the execution of the said promissory note for $37044.53, pay the same or the sum therein manetioned or any part thereof nor has it at any time since said date or at any time, though often thereto requested by the said William W. Bierce Ltd., paid the said note or the sum therein mentioned or any part thereof nor has any third person for or on behalf of the said Kona Sugar Co. Ltd. or otherwise paid to the said William W. Bierce Ltd. the said sum or any part thereof. That at all times since the said supplementary contract of March 13, 1901 the aforesaid property has been in the possession of the Kona Sugar Co. Ltd. or its receivers, and the said property is now in the possession and under the control of F. L. Dortch, Esq., the Receiver of the Kona Sugar Co. Ltd.

XVI.

That the said rails, cars, engines and each and all of the articles before mentioned have been at all times mentioned in this petition and still are the property of the said William W. Bierce Ltd. and it has been and still is the true and lawful owner thereof and of each and every part thereof and is entitled to the possession thereof.

XVII.

That the said Kona Sugar Company is hopelessly in-
346 solvent and unable to pay the said note or the sum therein mentioned or any part thereof.

XVIII.

That from and after March 13th 1901, when the possession of the said engines, cars and other railroad equipments as specified in paragraph XIV of this petition was delivered to the said Kona Sugar Company, Limited, by this petitioner as aforesaid, the said property has been in constant use by the said Company and its Receivers as a plantation railroad for the said Kona Sugar Company, Limited. That as a result of said use and wear, and because of exposure to the actions of the element and for other reasons, the said engines, cars and other railroad equipments have been and are greatly depreciated in value; so that as your petitioner is informed and believes and upon such information and belief, alleges the truth to be the value of said railroad equipment as it now stands is not worth to your petitioner to exceed Ten thousand ($10,000.) Dollars.

XIX.

That as a result of the aforesaid transaction between your petitioner and the said Kona Sugar Company, Limited, this petitioner has suffered great and serious loss as aforesaid: that the continued possession, use, wear and tear and consequent depreciation in value of the said railroad equipment by the said Kona Sugar Company, Limited, and its respective receivers, is causing and will continue to cause great loss and damage to this petitioner, and is in violation of its rights under the law and especially of its rights under the aforesaid contract of March 13th 1901, mentioned in paragraph XIII of this petition.

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XX.

That because of the failure on the part of the said Kona Sugar Company, Limited, and its receiver as aforesaid to pay the said note for $37,044.53, and because of the great loss in value and depreciation of said property as aforesaid, and the damage resulting therefrom to this petitioner, and to prevent as far as possible any greater losses and damage, in this regard, this petitioner desires to resume possession of the aforesaid property and each and all portions thereof, and to this end has demanded from the said Kona Sugar Company, Limited and F. L. Dortch as its receiver, the return to it of the said engines, cars and other railroad equipment, and each and all portions thereof, but the said Kona Sugar Company, Limited and the said F. L. Dortch as the receiver thereof, have and each of them has neglected and refused, and they and each of them do still neglect and refuse to return the same or re-deliver the possession of the same or any part thereof to this petitioner.

XXI.

That this petitioner has been and is ready to do whatever justice and equity may require in the premises.

Wherefore, this petitioner prays:—

1. That this court will ascertain the amount due and owing upon the said promissory note of the Kona Sugar Company, Limited, to this petitioner set forth in paragraph XIII of this petition, and a copy of which is annexed hereto as Exhibit "B"

2. That upon the amount due upon said note being ascertained and fixed as aforesaid, this court will order, adjudge and decree that the said Kona Sugar Company, Limited, or F. L. Dortch as the receiver of said Company, shall pay the said sum thus ascertained and fixed to the said William 348 W. Bierce, Limited, and that unless the said Kona Sugar Company, Limited, or some third persons on its behalf shall pay the said sum to this petitioner within a short day to be fixed by this court in said decree, that the said Kona Sugar Company, Limited, and the said F. L. Dortch as receiver of said Company, shall, upon the failure to pay within the short day fixed as aforesaid, deliver the said engines, cars and other railroad equipment and each and every portion thereof as set forth in paragraph XIV of this petition to your petitioner, the said William W. Bierce, Limited upon the surrender and delivery by the said William W. Bierce Limited, of the said promissory note of the said Kona Sugar Company, Limited, for $37,044.53, and of all collateral security held by the said William W. Bierce, Limited.

3. That your Honor will adjudge and decree unto this petitioner such other and further relief in the premises as justice and equity may require, and your petitioner ever will pray.

By Kinney, McClanahan & Bigelow
Its Attorneys.
H. A. B.

Kinney, McClanahan & Bigelow
Attorneys for petitioner

Dated at Honolulu, February 12th, 1903.

349 Territory of Hawaii } ss.
Island of Oahu. }

H. A. Bigelow, being first duly sworn, on oath deposes and says: That he is one of the members of the firm of Kinney, McClanahan & Bigelow, attorneys for William W. Bierce Ltd., the above-named petitioner, and that he is the duly authorized and acting attorney-in-fact for the said William W. Bierce Ltd: that the said petitioner is a corporation organized and existing under the laws of the State of Louisiana and having its principal place of business in New Orleans in said State and in Chicago, State of Illinois; that the said firm of Kinney, McClanahan & Bigelow as the attorneys of record, and he as the attorney-in-fact, are the sole and only representatives of the said William W. Bierce Ltd., within this jurisdiction and are the only person or persons able to make affidavit to the petition herein; that he has read the foregoing petition and knows the contents thereof, and deposes on behalf of the said William W. Bierce Ltd., and as its attorney in fact, that the matters and things therein set forth are true; except as to those matters and things alleged on information and belief and that as to those he believes them to be true.

(Sig.) H. A. Bigelow

Subscribed and sworn to before me this 13th day of February, A. D. 1903.

(Sgd.) Wm. J. Forbes,
Notary Public, First Judicial Circuit Territory of Hawaii.

350 The order and decree of the court of the Third Circuit in the suit of M. W. McChesney & Sons vs. The Kona Sugar Company, Limited et al., filed April 20th, 1903.

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

Territory of Hawaii.

At Chambers.

R. W. McChesney, J. M. McChesney and F. W. McChesney carrying on business together in copartnership under the name of M. W. McChesney & Sons

—*vs*—

The Kona Sugar Co Ltd A Corporation and the First American Savings and Trust Co Ltd A Corporation

Decree and Order of Sale of All the Estate and Property of the Kona Sugar Co Ld.

Whereas heretofore to wit: on the 1st day of November 1902 there was filed in this cause a petition for an order direcing the sale of all of the property of the Kona Sugar Co Ld the defendant corporation in the hands of the receiver, and;

Whereas, the said petitioner coming on to be heard the same was granted and an order and decree of sale was made and issued out of this court, authorizing, empowering and directing the said receiver to advertise for sale and upon the 4th day of December 1902 at 11 o'clock a. m. at the front door of the Court House at Kailua Hawaii Territory of Hawaii to sell at public vendue all and singular the goods, chattels, effects and property real and personal and mixed of the said Kona Sugar Co Ld subject to all liens of every kind and nature upon said property at the date of said receivers appointment, and,

Whereas, under and by virtue of said decree and order of sale, the said receiver did proceed to advertise for sale, and upon the day and hour, and at the place mention in said decree and order of sale and in said advertisement, did duly
351 offer for sale the said property of the said Kona Sugar
Co Ld as in and by said decree and order of sale directed, at which time and place of sale there being no bidder nor any bid for said property the said sale was duly post-

poned to the hour of 11 o'clock on the 15th day of December, at the same place, and,

Whereas, in pursuance of said notice of continuance duly given as aforesaid and advertised, at the hour of 11 o'clock in the forenoon of the 15th day of December 1902 at the front door of the Court House at Kailua aforesaid, the said property was again duly offered for sale, at which time and place there being no bid nor bidder for said property the said sale was postponed without day, and subject to the further order of this Court in the premises, and

Whereas, upon a return having been duly made to this court by the receiver of his proceedings under said decree and order of sale the said decree and order of sale was by this Court vacated and annulled, and,

Whereas, thereafter the said receiver petitioned this Court to be permitted and authorized to enter into an agreement or contract whereby, and under which the cane growing upon the lands of the said Kona Sugar Co Ld might be harvested and manufactured into Sugar at a certain per cent, of the sugar so manufactured, and

Whereas, said petition duly coming on to be heard the same was granted, whereupon the said receiver did on to wit, the 28th day of December 1902 made and enter into a certain contract with one James Cowan Esq, whereby the said Cowan was to harvest the said cane manufacture the same into sugar under the direction and supervision of the said receiver and to receive as his compensation therefor one moiety of the sugar so manufactured, and

Whereas, under the said contract the said Cowan was
352 to harvest and manufacture into sugar the entire crop
of cane upon said lands, estimated at two thousand tons,
within a given time to wit within the period of months
and

Whereas, the said Cowan has up to this 20 day of April, only harvested and manufactured into sugar a very small proportion of said cane and derived therefrom 723 tons of sugar the same being on an average of 71 tons per working day, and

Whereas large amounts of said cane have been destroyed deteriorated and rendered worthless by the ravages of cattle, and the hand of Time, and there being no possible means by which said contract can be performed or sufficient revenue ever be directed thereunder or or by any other contract or means from the said cane, and that the expenses of the receivership are and will ever continue to increase beyond and out of all proportion of every income which can be derived from said property, and

Whereas it appearing to this Court that the property of the Kona Sugar Co Ld is and ever will be absolutely and entirely unproductive, being damnoas haereditas, consisting as it does, almost entirely of leasehold interests where the rents largely exceed the revenue, and

Whereas, it appearing to this Court that the interests of all parties will be best served and protected by an immediate sale of said property.

It is Ordered, Adjudged and Decreed that the Receiver of the said Kona Sugar Co Ld do, on the 27th day of April 1903 proceed to advertise for sale all and singular the goods chattels, and effects and property real personal and mixed of the said Kona Sugar Co Ld, wheresoever the same may be situate, now in the possession or under the control of the Receiver in the above entitled cause, or which said Receiver may be entitled to possess or control under and by virtue of
the decree of this Court made and entered on the 28th
353 day of March 1902; that is to say, all the lands tene-
ments and hereditaments of the said Kona Sugar Co. Ld
and all of its right title and interest in and to lands, lease hold interests rights of way, railroads, railroad equipments, locomotives, cars, sugar mill, and equipments thereto belonging, and also all buildings lumber and materials, trolleys, cane conveyors wire rope rools and implements, wagons and vehicles, harness, live stock, and all cane growing upon said lands upon the day of said sale, and all other property of said company of every kind and nature whatsoever, and having advertised said property for sale at public vendue at the front door of the Court House of the Third Circuit of the Territory of Hawaii at Kailua, Island of Hawaii from the 27th day of April 1903 to the 7th day of May 1903 both inclusive said Receiver do on the 9th day of May 1903 at the hour of 12 o'clock noon of said day, proceed to sell at public vendue free and clear of all liens and encumbrances of every kind and nature whatsoever all of the property of the Kona Sugar Co Ld hereinabove described, for the purpose of paying the debts and liabilities incurred by the receiver in the management and control of said property and also such other proper allowances compensation and disbursements of the Receiver,

as may be directed to be paid by the order of this Court; and to satisfy liquidate and discharge, so far as may be, and in the order of their preference, all liens, claims or demands legal or equitable existing against the said Kona Sugar Co Ld.

And it is further ordered, adjudged and decreed that said sale shall be upon the terms and in the manner following—

First: Said Receiver shall give public notice of the time and place of such sale by advertisement in the Honolulu Evening Bulletin, Honolulu Evening Star and Pacific Commercial Advertiser, daily newspapers published in Honolulu
from the 27th day of April 1903 to the 7th day of May
354 1903 both inclusive, as often as the same shall be published before the day of sale.

Second: That said sale shall be at public auction at the front door of the Court House of the Third Circuit at Kailua Hawaii, Territory of Hawaii at the hour of twelve o'clock noon of the 9th day of May, A. D. 1903.

Third: That the said Receiver may adjourn the said sale from day to day or otherwise, giving such notice as to him shall seem reasonable of such adjournment and may make the sale at the time and place to which the same may be adjourned.

Fourth: Said Receiver shall offer for sale as one parcel all of the property real personal and mixed, and rights privileges immunities and franchises of said company free and clear of all liens and incumbrances

Fifth: Said Receiver shall before accepting any bid require that the person or persons making the same deposit with him five per cent. (5%) of the amount of such bid in cash, and in the event that said property is sold, the purchaser or purchasers shall forthwith deposit in cash with the said Receiver additional five per cent (5%) of the purchase price.

Sixth: Said Receiver may fix a time and place for the final consummation of said sale at a time not later than ten days after the date thereof, which time may be adjourned by the consent of this Court, at the time and place fixed by the Receiver for the consummation of the sale and after the same shall have been confirmed by this Court, the purchaser or purchasers of said property shall pay the amount remaining unpaid of his or their respective bid to the said receiver in United States gold coin, whereupon said purchaser or pur-

chasers shall be entitled to receive possession of said property so purchased by him or them from the said receiver who shall thereupon make and execute all such deeds and in-
355 struments in writing as may be necessary to convey the said property to him or them.

Seventh. In case the purchaser or purchasers shall fail to comply with the terms of his or their bid or to complete said purchase said receiver may with or without further application to this Court, again advertise said property for sale, and sell the same on the terms and conditions hereinbefore stated.

Eighth. In case the purchaser or purchasers shall fail to comply with the terms of the bid, or with any order of the Court relating to the consummation of the sale or purchase or to the payment to be made on account thereof, then the sums paid by such purchaser or purchasers shall be forfeited as a penalty for such non-compliance;

If any sale for which a deposit is made is not confirmed by the court the deposit shall be returned to the bidder.

It is further ordered, adjudged and decreed that the entire fund to arise from the sale of said property be held by the said receiver to await the further order of this Court.

And it is further ordered, adjudged and decreed, that any party to this cause or any intervening petitioner, and also the Receiver may at any time, apply to this Court for further relief at the foot of this decree, as well as to such alterations thereof in respect to the conditions of said sale, or in any respect to any matter, which may affect the rights of any of the parties to this cause as may be just and proper.

Done at Chambers this 20th day of April A. D. 1903

W. S. Edings
Circuit Judge Third Circuit Territory of Hawaii.

(Endorsed) April 20, 1903. J. P. Curts Clerk.

356 The order confirming the sale of property in the suit of M. W. McChesney & Sons vs. The Kona Sugar Company, Limited, et al., filed June 1st, 1903.

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT,

Territory of Hawaii.

In Equity.

M. W. McChesney & Sons.
vs.
The Kona Sugar Company Ld. and The First American Savings and Trust Co. Ld.

Order Confirming Sale.

F. L. Dortch, Receiver of the Kona Sugar Company Ld., having duly made a return of his proceedings under and by virtue of a decree and order of sale made by this Court, in the above entitled suit on the 9th day of May 1903, and the same now coming on to be heard, due notice of said hearing having been given, and it having been proved to the satisfaction of this Court, that notice of said sale was given as required by the decree and order of sale aforesaid, and,

That at the time and place of holding such sale specified in said notice, he sold at Public auction to C. J. Hutchins, Trustee, he being the highest bidder, for the sum of Twelve Thousand Two hundred and fifty dollars ($12,250) that being the highest sum bid, all and singular the property described in said Decree and order of Sale and in said notice of sale.

That said sale was legally made and fairly conducted, and
that the sum bid, was not disproportionate to the value
357 of the property sold, and that the interests of all par-
ties to the said suit would and will be best consered by the sale of the said property so made as aforesaid, and no good reason appearing why said sale should not be confirmed.

It is hereby ordered, adjudged and decreed that the said sale be and the same is hereby confirmed, approved and declared valid, and the said F. L. Dortch Receiver as aforesaid is hereby authorized and directed to make execute and deliver to the said purchaser any and all such instruments in writing as may be necessary and proper to legally and effectually convey to and vest in the said purchaser all and singular the said property described in said order of Sale and the Notice of sale. And the right Title and interest of the said Kona Sugar Co. Ld. and of said receiver in and to the same, free and clear of incumbrances upon the compliance by the said purchaser with the terms and conditions of the order directing said sale.

And it is further ordered and decreed that the said Receiver, upon the payment of the remainder of the purchase price of said property, file in this Court his final report, showing specifically all amounts now due under the Receivership of the Kona Sugar Co. Ld. and to whom due. All amounts paid out by him and to whom paid, also all sums received by him, and all sums now remaining in his hands undisbursed, also all amounts now due him and by whom.

Done at Chambers this 1st day of June A. D. 1903.

(Signed) W. S. Edings
Circuit Judge Third Circuit Territory of Hawaii.

Endorsed: Filed June 1st, 1903 J. P. Curts Clerk.

358 The petition for a writ of error in the case of William W. Bierce, Limited, a corporation, plaintiff in error, vs. M. W. McChesney and J. M. McChesney, surviving partners in the co-partnership of M. W. McChesney, J. M. McChesney, et al., defendants in error.

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

October Term 1903.

William W. Bierce Limited, a corporation, *Plaintiff in error.* —*vs*— R. W. McChesney and J. M. McChesney surviving partners in the co-partnership of R. W. McChesney, J. M. McChesney and F. W. McChesney, a co-partnership carrying on business under the firm name and style of M. W. McChesney & Sons, the Kona Sugar Company Limited, a corporation, F. L. Dortch, Receiver of the Kona Sugar Company, Limited, The First American Savings & Trust Co. of Hawaii Limited, a corporation, Kapiolani Estate Limited, a corporation L. M. Whitehouse, J. D. Paris, Hannah J. Paris, Eliza Roy, W. H. Shipman, Mary E. Shipman, J. D. Johnson, W. H. Johnson and Caroline J. Robinson, *Defendants in error.*	$2. Stamps.

Petition for Writ of Error.

To the Honorable Justices of the Supreme Court of the Territory of Hawaii.

Your petitioner William W. Bierce Limited, a corporation, organized, created and existing under and by virtue of the laws of the State of Louisiana, deeming itself aggrieved by the decision and order of the Honorable W. S. Edings, Judge of the Circuit Court of the Third Judicial Circuit, sitting at Chambers, In Equity, made on the 20th day of April, A. D. 1903, and filed in said Court on the 20th day of April 1903, in that certain suit wherein R. W. McChesney, J. M. McChesney and F. W. McChesney, a co-partnership doing business under the firm name and style of M. W. McChesney & Sons are plaintiffs, and the Kona Sugar Company, Lim-

ited, a corporation F. L. Dortch, Receiver of the Kona Sugar Company, Limited, and the First American Sav-
359 ings & Trust Company of Hawaii Limited, a corporation are defendants, and Kapiolani Estate Limited, L. M. Whitehouse, J. D. Paris, Hannah J. Paris, Eliza Roy, W. H. Shipman, Mary E. Shipman, J. D. Johnson, W. H. Johnson, Caroline J. Robinson and your petitioner William W. Bierce Limited, a corporation are intervenors, and wherein William W. Bierce Limited, filed on the 26th day of Feby A. D. 1903, a petition in intervention for the recovery of certain specific property in the hands of said F. L. Dortch as Receiver of said Kona Sugar Company, Limited, hereby and herein prays for the issuance of a writ of error to said Court that the record and proceedings may by this Honorable Court be examined and such judgment be entered as the facts and law reveal thereby shall warrant.

And your petitioner further shows that there is manifest error in said record as is shown by the assignment of errors filed herewith, and that execution on said decision and order has not been fully satisfied.

And your petition will ever pray.

Dated, Honolulu, August 25, A. D. 1903.

WILLIAM W. BIERCE LIMITED,
by S. HASKET DERBY
Its attorney in fact.

360 Honolulu Oahu
Territory of Hawaii } ss.

S. Hasket Derby, being first duly sworn on oath deposes and says:

That he is one of the firm of Kinney, & McClanahan, attorneys for William W. Bierce Limited, plaintiff in error herein, and is the attorney in fact of said plaintiff in error; that said plaintiff in error is a foreign corporation organized and existing under the laws of the State of Louisiana and having its principal place of business in the City of New Orleans in said State and in the City of Chicago in the State of Illinois; that the said firm of Kinney & McClanahan and affiant as attorney in fact, are the representatives of the said William W. Bierce Limited within this jurisdiction, and are the proper person or persons to make affidavit to the petition herein; that affiant has read the foregoing petition and knows the contents thereof and deposes on behalf of the said William W. Bierce Limited and as its attorneys in fact, that the matters and things therein set forth are true.

Dated Honolulu August 25th A. D. 1903.

(Signed) S. HASKET DERBY
Attorney in fact for William W. Bierce Limited.

Subscribed and sworn to before me this 25th day of August 1903.

(Signed) GUSSIE H. CLARK
(Seal) *Notary Public First Judicial Circuit*

361 IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

October Term 1903.

William W. Bierce Limited, A corporation,
Plaintiff in error.
—*vs*—
R. W. McChesney and J. M. McChesney surviving partners in the copartnership of R. W. McChesney, a co-partnership carrying on business under the firm name and style of M. W. McChesney & Sons, The Kona Sugar Company Limited, a corporation, F. L. Dortch, Receiver of the Kona Sugar Company, Limited, The First American Savings & Trust Co. of Hawaii Limited, a corporation, Kapiolani Estate Limited, a corporation, L. M. Whitehouse J. D. Paris, Hannah J. Paris, Eliza Roy, W. H. Shipman, Mary E. Shipman, J. D. Johnson, W. H. Johnson and Caroline J. Robinson.
Defendants in error.

Notice.

To the above named defendants in error:

You and each of you will take notice that a writ of error in the above entitled cause, has issued from the Supreme

Court of the Territory of Hawaii, to the Circuit Court of the Third Judicial Circuit of said Territory, sitting at Chambers as a Court of Equity.

Dated, Honolulu, August 25th 1903.

(Sig) KINNEY & McCLANAHAN
E. B. M.
Attorneys for William W. Bierce Limited plaintiffs in error.

362 IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

October Term 1903.

William W. Bierce Limited, a corporation, *Plaintiff in error.* *—vs—* R. W. McChesney and J. M. McChesney surviving partners in the co-partnership of R. W. McChesney, J. M. McChesney and F. W. McChesney, a co-partnership carrying on business under the firm name and style of M. W. McChesney & Sons, The Kona Sugar Company Limited, a corporation, F. L. Dortch, Receiver of the Kona Sugar Company, Limited, The First American Savings & Trust Co. of Hawaii Limited, a corporation, Kapiolani Estate Limited, a corporation L. M. Whitehouse, J. D. Paris, Hannah J. Paris, Eliza Roy, W. H. Shipman, Mary E. Shipman, J. D. Johnson, W. H. Johnson and Caroline J. Robinson, *Defendants in error.*	Writ of Error.

Assignment of Errors.

Now comes the above named plaintiff in error and petitioner and says, that in the record and proceedings in a suit lately pending in the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, at Chambers, in Equity, be-

fore the Honorable W. S. Edings, Presiding Judge, the same being for the appointment of a Receivee for the Kona Sugar Company Limited wherein R. W. McChesney, J. M. McChesney and F. W. McChesney, a co-partnership, doing business under the firm name and style of M. W. McChesney & Sons, were plaintiffs, and the Kona Sugar Company Limited, a corporation, F. L. Dortch, Receiver of the Kona Sugar Company, Limited, and the First American Savings
and Trust Company of Hawaii Limited, a corporation,
363 were and are defendants, and Kapiolani Estate Limited,
L. M. Whitehouse, J. D. Paris, Hannah J. Paris, Eliza Roy, W. H. Shipman, Mary E. Shipman, J. D. Johnson, W. H. Johnson, Caroline J. Robinson and William W. Bierce Limited, a corporation plaintiff in error herein were and are intervenors, there is manifest error, and said plaintiff in error and petitioner herein now makes, files and presents the following assignment of errors upon which it will rely as follows, to wit:

—1—

That said Court erred in making, rendering, entering and filing in said cause the following order.

"In the Circuit Court of the Third Circuit,

Territory of Hawaii,

At Chambers.

"R. W. McChesney, J. M. McChesney and F. W. McChesney, carrying on business together in Copartnership under the name of M. W. McChesney & Sons.

—vs—

The Kona Sugar Co. Ld a corporation, and the First American Savings and Trust Co. Ld a corporation.

Decree and Order of Sale of All the Estate and Property of The Kona Sugar Co. Ld.

"Whereas, heretofore, to wit, on the first day of Novem-

"ber 1902 there was filed in this cause a petition for an or-"der directing the sale of all of the property of the Kona "Sugar Co Ld. the defendant corporation in the hands of the "receiver, and,;

"Whereas, the said petition coming on to be heard the same "was granted and an order and decree of sale was made and "issued out of this Court, authorizing, empowering and di-"recting the said Receiver to advertise for sale and upon "the 4th day of December 1902 at 11 o'clock A. M., at the "front door of the Court House at Kailua Hawaii, Territory "of Hawaii to sell at public vendue all and singular
364 "the goods, cahttels, effects and property real and per-"sonal and mixed of the said Kona Sugar Co Ld subject "to all liens of every kind and nature upon said property "at the date of said receivers appointment, and,

"Whereas and by virtue of said decree and order of sale, "the said receiver did proceed to advertise for sale, and upon "the day and hour and at the place mentioned in said decree "and order of sale and in said advertisement, did duly offer "for sale the said property of the Kona Sugar Co Ld as in "and by said decree and order of sale directed, at which time "and place of sale there being no bidders nor any bid for "said property the said sale was duly postponed to the hour "of 11 o clock on the 15th day of December, at the same "place, and

"Whereas, in pursuance of said notice of continuance duly "given as aforesaid and advertised at the hour of 11 oclock "in the forenoon of the 15th day of December 1902 at the "front door of the Court house at Kailua aforesaid, the said "property was again duly offered for sale, at which time and "place there being no bid nor bidders for said property the "said sale was postponed without day, and subject to the "further order of this Court in the premises, and,

"Whereas, upon a return having been duly made to this "Court by the receiver of his proceedings under aaid decree "and order of sale, the said decree and order of sale was by "this court vacated and annulled, and,

"Whereas, thereafter the said receiver petitioned this "court to be permitted and authorized to enter into an agree-"ment or contract whereby and under which the can growing "upon the lands of the said Kona Sugar Co Ld might be "harvested and manufactured into sugar at a certain per "cent of the sugar so manufactured, and

365 "Whereas, said petition duly coming on to be heard

“the same was granted, whereupon the said receiver
“did on to wit, the 28th day of December 1902, make and enter
“into a certain contract with one James Cowan Esq.
“whereby the said Cowan was to harvest the said cane and
“manufacture the same into sugar under the direction and
“supervision of the said receiver and to receive as his compensation
“therefrom one moiety of the sugar so manufactured,
“and

“Whereas, under the said contract the said Cowan was to
“harvest and manufacture into sugar the entire crop of cane
“upon said lands, estimated at two thousand tons, within
“a given time to wit within the period of months,
“and

“Whereas, the said Cowan has up to this 20th day of April
“only harvested and manufactured into sugar a very small
“proportion of said cane and derived therefrom 723 tons of
“sugar the same being on an average of 7 tons per working
“day, and

“Whereas large amounts of said canes have been destroyed
“deteriorated and rendered worthless by the ravages of cattle
“and the hands of Time, and there being no possible means
“by which said contract can be performed or sufficient revenue
“ever be derived thereunder or by any other contract
“or means from the said cane, and, that the expenses of the
“receivership are and will ever continue to increase beyond
“and out of all proportions of every income which can be
“derived from said propert and,

“Whereas it appearing to this Court that the property of
“the Kona Sugar Co. Ld is and ever will be absolutely and
“entirely unproductive, being damnosa hacte ditas, consisting
“as it does almost entirely of leasehold interests where
“the rents largely exceed the revenue, and

“Whereas, it appearing to this Court that the interest of
“all parties will be best served and protected by an immediate
“sale of said property
366 “sale of said property.

“It is ordered, adjudged, and decreed that the receiver
“of the said Kona Sugar Co Ld. do on the 27th day
“of April 1903 proceed to advertise for sale all and singular
“the goods, chattels, and effects and property, real personal
“and mixed of the said Kona Sugar Co Ld, wheresoever the
“same may be situate, now in the possession or under the
“control of the receiver, in the above entitled cause, or which
“said receiver may be entitled to possess or control under and

"by virtue of the decree of this court made and entered on "the 28th day of March 1902, that is to say, all the lands, "tenements and hereditaments of the said Kona Sugar Co "Ld and all of its right, title and interest in and to lands, "leasehold interests rights of way, railroads, railroad equipments, locomotives, cars, sugar mill, and euipments there- "to belonging, and also all buildings lumber and materials, "trolleys, cane conveyors, wire ropes, tools and implements, "wagons and vehicles, harness live stock, and all cane growing upon said lands upon the day of said sale, and all other "property of said company of every kind and nature whatsoever, and having advertised said property for sale at "public vendue at the front door of the Court house of the "Third Circuit of the Territory of Hawaii at Kailua, Island "of Hawaii from the 27th day of April 1903 to the 7th day of "May 1903 both inclusive said receiver do on the 9th day "of May 1903 at the hour of 12 oclock noon of said day, "proceed to sell at public vendue, free and clear of all liens 'and incumbrances of every kind and nature whatsoever all "of the property of the Kona Sugar Co Ld hereinabove described, for the purpose of paying the debts and liabilities "incurred by the receiver in the management and control of "said property and also such other proper allowance, compensation and disbursements of the Receiver, as may be
367 "directed to be paid by the order of this Court; and to
"satisfy liquidate and discharge, so far as may be, and "in the order of their legal preferment, all liens claims or "demands legal or equitable existing against the said Kona "Sugar Co Ld.

"And it is further order, adjudged and decreed that said "sale shall be upon the terms and in the manner following.

"First: Said Receiver shall give public notice of the "time and place of such sale by advertisement in the Honolulu Evening Bulletin, Honolulu Evening Star and Pacific "Commercial Advertiser, daily newspapers published in "Honolulu from the 27th day of April 1903 to the 7th day "of May 1903 both inclusive, as often as the same shall be published before the day of sale.

"Second: That said sale shall be at public auction at the "front door of the Court House of the Third Circuit at Kailua Hawaii Territory of Hawaii, at the hour of twelve "oclock noon of the 9th day of May A. D. 1903.

"Third: That the said Receiver may adjourn the said "sale from day to day or otherwise, giving such notice as to

shall seem reasonable of such adjournment and may
ke the sale at the time and place to which the same may
adjourned.

'ourth: Said receiver shall offer for sale as one parcel
of the property real, personal and mixed, and rights,
vileges, immunities and franchises of said Company free
clear of all liens and incumbrances.

'ifth: Said receiver shall before accepting any bid, re-
re that the person or persons making the same deposit
h him five per cent. (5%) of the amount of such bid in
h, and in the event that said property is sold, the pur-
ser or purchasers shal forthwith deposit in cash with
said receiver an additional five per cent (5%) of the
'purchase price.

"Sixth: Said receiver may fix a time and place for
the final consumation of said sale at a time not later
n ten days after the date thereof, which time may be ad-
rned by the consent of this Court. At the time and place
d by the receiver for the consumation of the sale and
er the same shall have been confirmed by this Court, the
chaser or purchasers of said property shall pay the
ount remaining unpaid of his or their respective bid to
said receiver in United States gold coin, whereupon
d purchaser or purchasers shall be entitled to receive
session of said property so purchased by him or them
m the said receiver who shall thereupon make and exe-
e all such deeds and instruments in writing as may be
essary to convey the said property to him or them.

Seventh: In case the purchaser or purchasers shall fail
comply with the terms of his or their bid or to complete
d purchase said receiver may, with or without further
plication to this Court, again advertise said property
sale, and sell the same on the terms and conditions here-
efore stated.

Eighth: In case the purchaser or purchasers shall fail
comply with the terms of the bid, or with any order of the
rt relating to the consumation of the sale or purchase
to the payment to be made on account thereof, then the
ns paid by such purchaser shall be forfeited as a pen-
y for such non compliance.

f any sale for which a deposit is made is not confirmed
the Court the deposit shall be returned to the bidder.

t is further ordered, adjudged and decreed that the en-
e fund to arise from the sale of said property be held

"by the said receiver to await the further order of this "Court.

"And it is further ordered, adjudged and decreed, that
369 "any party to this cause or any intervening petitioners, "and also the receiver, may at any time, apply to this "Court for further relief at the foot of this decree, as well as "to such alterations thereof in respect to the conditions of "said sale, or in any respect to any matter, which affect the "right of any of the parties to this cause as may be just and "proper.

"Done at Chambers this 20th day of April A. D. 1903.

W. S. Edings

Circuit Judge Third Circuit Territory of Hawaii.

Which said order is a part of the record in said suit.

—2—

That said Court erred in making, rendering and entering its aforesaid order in said suit upon the pleadings and record therein.

—3—

That said Court erred by its said order of the 20th day of April A. D. 1903, in directing the sale of the property of the Kona Sugar Company Limited.

—4—

That said Court erred by its order of the 20th day of April A. D. 1903, in directing the sale of the property of the Kona Sugar Company, Limited of its own motion.

—5—

That said Court erred by its order of the 20th day of April A. D. 1903, in directing the sale of all and singular the goods, chattels and effects and property, real and personal and mixed of the said Kona Sugar Company, Limited, wheresoever the same might be situate now in the possession or under the control of the Receiver of the said Kona Sugar Company, Limited.

—6—

That said Court erred by said order of the 20th day of
April A. D. 1903, in directing a sale inter alia of all the
370 said Kona Sugar Company Limited's right, title and in-
terest in and to its railroads, railroad equipments, locomotives and cars.

—7—

That said Court erred in making any order of sale in said suit.

—8—

That said Court erred in making said order of sale of the 20th day of April A. D. 1903, without notice to plaintiff in error, William W. Bierce Limited, and intervenor in said suit.

—9—

That said Court erred in not making plaintiff in error and intervenor in said suit a party to said order.

—10—

That said Court erred in making the said order of the 20th day of April A. D. 1903, while the plaintiff in error's cause in intervention was pending and unsettled.

—11—

That said Court erred in said order of April 20th 1903, in directing the sale of the property, or any part of the property, involved in plaintiff in error's suit in intervention.

—12—

That said Court erred by and in its order of the 20th of April A. D. 1903, in ordering, adjudging and decreeing that the said Receiver of the said Kona Sugar Company, Limited, do on the 27th day of April A. D. 1903, proceed to advertise for sale the goods, chattels and effects then in the possession and under the control of said Receiver, which were the subject matter of plaintiff in error's suit in intervention filed in said Court on the 26 day of Feby A. D. 1903.

—13—

371 That said Court erred by and in its said order of the 20th day of April A. D. 1903, in ordering, adjudging and decreeing that the said Receiver of the said Kona Sugar Company Limited, do on the 27th day of April 1903, proceed to advertise for sale the goods, chatteld and effects then in the possession and under the control of said Receiver, which were the subject matter of plaintiff in error's suit in intervention filed in said Court on the 26th day of Feby A. D. 1903, to wit:

362 tons of steel T rails weighing 35 lbs. to the yd.
Joints for laying 550 tons of steel T rails.
Railroad track spikes to lay 550 tons of said rails.
10 sets of 35 lb. split switch material, complete
16 cars 28 feet long, 7 feet wide for 3 feet gauge track
One 9 x 14 Class "A" saddle tank locomotive
One 10 x 16 Class "M" back saddle tank locomotive
One Howe Narrow gauge track scale, capacity 25 tons
One set re-railers
Four track gaugers, 3 feet
One rail bender
One track drill
One section car with seats and
Two Jacks.

—14—

That said Court erred in failing in said order of April 20th 1903, to except from said directed sale the property and all thereof involved in plaintiff in error's suit in intervention.

—15—

That said Court erred in making, rendering and entering said order of April 20th, 1903, in this, that said order was and is contrary to law and equity as shown by the plead-
372 ings and records in said suit.

Dated Honolulu, August 25 A. D. 1903.

Kinney & McClanahan
E. B. M.
Attorneys for William W. Bierce Limited plaintiff in error.

(Endorsed) Filed August 25 1903. George Lucas, Clerk.

373 IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

William W. Bierce Limited, a corporation,
Plaintiff in error
—*vs*—
R. W. McChesney and J. M. McChesney surviving partners in the co-partnership of R. W. McChesney, J. M. McChesney and F. W. McChesney, a co-partnership carrying on business under the firm name and style of M. W. McChesney & Sons, The Kona Sugar Company Limited, a corporation, F. L. Dortch, Receiver of the Kona Sugar Company, Limited, The First American Savings & Trust Co. of Hawaii Limited, a corporation, Kapiolani Estate Limited, a corporation, L. M. Whitehouse, J. D. Paris, Hannah J. Paris, Eliza Roy, W. H. Shipman, Mary E. Shipman, J. D. Johnson W. H. Johnson and Caroline J. Robinson,
Defendants in error.

Summons
$2 Stamps

THE TERRITORY OF HAWAII

To The High Sheriff of the Territory, or his Deputy; the Sheriff of the Island of ...., or his Deputy:

You are commanded to make service upon R. W. McChesney and J. M. McChesney surviving partners in the co-partnership of R. W. R. W. McChesney, J. M. McChesney and F. W. McChesney, a co-partnership carrying on business under the firm name and style of M. W. McChesney & Sons, the Kona Sugar Company Limited, a corporation, F. L. Dortch, Receiver of the Kona Sugar Company Limited, the First American Savings and Trust Co. of Hawaii Limited, a corporation, Kapiolani Estate Limited a corporation L. M. Whitehouse, J. D. Paris, Hannah J. Paris, Eliza Roy, W. H. Shipman, Mary E. Shipman, J. D. Johnson, W. H. Johnson and Caroline J. Robinson, defendants, of the annexed assignment of error and notice that they may take such action in the premises as they may deem advisable at the coming October term 1903, of this Honorable Court to be held in the Court room of said Court at Honolulu on Monday the 5th day of October A. D. 1903, at 10 o'clock in the forenoon of said day.

And have you then there this Writ with full return of your doings thereon.

Witness the Honorable Chief Justice of the Supreme Court of the Territory of Hawaii, at Honolulu, Island of Oahu, this 25th day of August 1903.

(Signed) GEORGE LUCAS
(Seal) *Clerk.*

374 Written on the back of said Term Summons are the following endorsements:

RETURN OF SERVICE.

Served this summons as follows:

On John D. Paris at Kaawaloa, S. Kona, this 7 day of September 6 o'clock a. m. 1903.

On Hannah J. Paris at Kaawaloa S. Kona this 7 day of September 6 o'clock a. m. 1903.

On John D. Johnson at Kainaliu N. Kona this 7 day of September 7 o'clock a. m. 1903

On W. H. Johnson at Kuamoo N. Kona this 7 day of September 7 1/2 o'clock a. m. 1903 by delivering to each of them a certified copy hereof and of the petition annexed hereto, and at the same time showing each the original at Kawaaloa, S. Kona, Kainaliu, N. Kona and Kuamoo, N. Kona Hawaii on Sept 7th 1903 as per above memo of service.

(Signed) GEORGE P. KAMAUOHA
Deputy Sheriff South Kona

Dated Sept 7 1903

Served this Summons as follows:

On Kapiolani Estate, Limited, through J. F. Colburn, its Treasurer; and

On the First American Savings and Trust Company of Hawaii, Limited, a corporation, through W. G. Cooper, its Cashier, all of Honolulu, Oahu, at Honolulu, Oanu, the 27th day of August, A. D. 1903; and

On R. W. McChesney and J. M. McChesney, surviving partners in the co-partnership of M. W. McChesney and Sons, through J. M. McChesney in his private capacity and through J. M. McChesney as Attorney-infact for R. W. McChesney; and

On the Kona Sugar Company, Limited, through J. M. McChesney, its President; and

F. L. Dortch as Receiver of the Kona Sugar Company, Limited; and

On Caroline J. Robinson, all of Honolulu, Oahu, at Honolulu Oahu, the 28th day of August, A. D. 1903; and

On Eliza Roy at Honolulu, Oahu, the 29th day of August A. D. 1903; and

On L. M. Whitehouse, at Honolulu, the 31st day of August A. D. 1903.

By delivering to each of them a certified copy hereof and of the Notice and Assignment of Errors hereto annexed, and at the same time showing each of them the original as directed.

Dated Honolulu, Oahu, August 31, A. D. 1903.

(Signed) ALBERT MCGURN
Deputy Sheriff, Territory of Hawaii.

Served this Summons as follows on W. H. Shipman and Mary E. Shipman, Hilo, Hawaii, this 5th day of September A. D. 1903, by delivering to each a certified copy hereof and of the Petition annexed hereto and at the same time showing each the Original at Hilo, District of South Hilo, Island and Territory of Hawaii.

(Signed) H. S. OVEREND
Deputy Sheriff of Hawaii.

Endorsed: Summons. Issued at 3 o'clock P. M. August 25, 1903 (Signed) George Lucas Clerk. Returned at 4:25 o'clock P. M. September 23, 1903 (Signed) J. S. Thompson, Clerk.

375 The following exhibits offered in evidence on the trial of said cause by counsel for the defendant, which were received and read in evidence on said trial and were marked for identification, and are in the words and figures following, to-wit:

(Copy)

EXHIBIT 1.

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT,

Territory of Hawaii.

October 1902 Term.

William W. Bierce Ltd *Plaintiff,* *vs.* M. F. Scott, Receiver of the Kona Sugar Co., Ltd. and the Kona Sugar Co. Ltd. *Defendants.*	Action to Enforce Materialman's Lien.

ORDER.

The motion of the plaintiff in the above entitled cause that this Court issue an order allowing the plaintiff herein to join in an action to enforce a materialman's lien against the Kona Sugar Co., Ltd. M. F. Scott as and for Receiver of said Company, having been duly considered, it is hereby ordered that the said Plaintiff be and is hereby allowed to join in its said action against the said Kona Sugar Co. Ltd., whatever person or persons necessary or proper as defendants in said action.

(Sig.) W. S. EDINGS (Seal)
Judge of the Circuit Court of the Third Judicial Circuit.

Kailua, Kona, Hawaii. Aug 1st 1902.

377 IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT

Territory of Hawaii.

October, 1902 Term.

William W. Bierce Ltd *Plaintiff,* *vs.* M. F. Scott, Receiver of the Kona Sugar Co., Ltd. and the Kona Sugar Co. Ltd. *Defendants.*	Action to Enforce Materialman's Lien.

NOTICE.

To M. F. Scott, Receiver of the Kona Sugar Co. Ltd.

You will please take notice that upon Friday August 1st 1902, at ten o'clock A. M. we shall present the attached motion to the Hon. W. S. Edings Judge of the Circuit Court of the Third Judicial Circuit and ask that the same be allowed.

(Sig.) KINNEY BALLOU & MCCLANAHAN,
Attorneys for William W. Bierce Ltd.

Kailua, Kona, Hawaii, July 31st, 1902.

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378 IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT,

Territory of Hawaii.

October, 1902 Term.

William W. Bierce Ltd *Plaintiff,* *vs.* M. F. Scott, Receiver of the Kona Sugar Co., Ltd. and the Kona Sugar Co. Ltd. *Defendants.*	Action to Enforce Materialman's Lien.

MOTION.

Now comes the Plaintiff in the above entitled cause, by its attorneys Kinney, Ballou and McClanahan, and moves this Honorable Court that it issue an order allowing the plaintiff herein to join in an action to enforce a materialman's lien against the Kona Sugar Co. Ltd., M. F. Scott as and for the Receiver of said Company.

This motion is based upon the record in said case and upon affidavits of H. A. Bigelow and Charles S. Dole, hereto annexed and made a part hereof.

(Sig) William W. Bierce, Ltd
by its attorneys
(Sig) Kinney Ballou & McClanahan

Kailua, Kona, Hawaii.
July 31, 1902

379 Kailua Hawaii
Territory of Hawaii. } ss.

H. A. BIGELOW, being first duly sworn, on oath deposes and says,

That he has examined the "Mechanics Lien Record" kept in the office of the Clerk of the Third Judicial Circuit of the Territory of Hawaii, and kept by said Clerk; that on page said record appears the notice of lien of materialman, said notice of lien being filed by William W. Bierce, Ltd., a Louisana Corporation against the Kona Sugar Co. Ltd., an Hawaiian Corporation for the sum of $37044.53. That said notice of lien was filed with the said Clerk upon the 14th day of May, 1902, and is now a part of the records of this Court; that said notice of lien is the same as notice of lien attached to the affidavit of Charles S. Dole hereto attached and is the same notice of lien

And further affiant said not.

(Sig) H. A. BIGELOW

Subscribed and sworn to before me this 1st day of August A. D. 1902.

(Sig) J. P. CURTS
Clerk of the Circuit Court Third Judicial Circuit Territory of Hawaii.

380 Honolulu Oahu
Territory of Hawaii } ss.

CHARLES S. DOLE, being first duly sworn, on oath deposes and says:

That he is an attorney at law and is at the present time and has been for the last year past engaged in the practice of law in the office of Kinney, Ballou & McClanahan, attorneys for William W. Bierce Ltd.

That on or about May 12th 1902, he served upon the Kona Sugar Co. Ltd., at its Honolulu office, a copy of the notice of
annexed
materialman's lien, a true copy of which is hereto attached marked Exhibit "A" and made a part hereof, and further affiant saith not.

(Sig) Charles S. Dole

Subscribed and sworn to before me this 29th day of July, A. D. 1902.

J. Louis Horner
(Seal) *Notary Public, First Judicial Circuit*
Territory of Hawaii.

381 CLERK'S CERTIFICATE.

I hereby certify the foregoing to be full true & correct copies of an order, Notice, Motion and two Affidavits on file in the above entitled cause and I further certtfy that the notice of materialman's lien attached to the certified copy of the complaint in this cause and marked Ex. B is a full true and correct copy of the original that is attached to the affidavit of Chas. S. Dole.

J. P. Curts,
(Seal) *Clerk Circuit Court, Third Circuit.*
Ty. of Hawaii.

(Endorsed): Filed Aug. 1, 1902. J. P. Curts Clerk.

382 EXHIBIT 2.

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT,

Territory of Hawaii.

October 1902 Term.

William W. Bierce, Ltd. *Plaintiff,* *vs.* M. F. Scott Receiver of the Kona Sugar Co Ltd., and the Kona Sugar Co. Ltd. *Defendants.*	Action to Enforce Materialman's Lien (Stamp)

COMPLAINT.

To the Honorable W. S. Edings, Judge of the Circuit Court of the Third Judicial Circuit, Territory of Hawaii.

Now comes William W. Bierce, Ltd., plaintiff herein and, consent of Court having been first obtained, for cause of action shows unto your Honor:

That the Plaintiff herein is a corporation organized and existing under and by virtue of the laws of the State of Louisiana and having its Principal place of Business in New Orleans, said state of Louisiana. That the said defendant M. F. Scott is a resident of Kona, Island and Territory of Hawaii and within the jurisdiction of this Honorable Court. That the said defendant the Kona Sugar Co Ltd. is a corporation duly organized and existing under the laws of the Territory of Hawaii, having an office in Honolulu in said Territory and doing business in said District of North Kona, Island and Territory of Hawaii, within the jurisdiction of this Honorable Court.

That the said M. F. Scott was upon the 28th day of March A. D. 1902, by an order of this Honorable Court appointed as receiver of said Kona Sugar Co. Ltd and that he is
383 now acting as receiver of said Company.

That upon February 21st 1900, the Plaintiff and the said Kona Sugar Co. Ltd., entered into a certain contract agreement in writing, a cop of said contract being hereto attached. marked exhibit "A" and made a part hereof. That the plaintiff furnished to the said Kona Sugar Co. Ltd., in accordance with the terms of said contract, and under said contract at the price agreed upon in said contract, the goods, merchandise, and materials which by the terms of said concontract the plaintiff was obliged to furnish to the said Kona Sugar Co. Ltd.

That the goods, merchandise and materials thus by Plaintiff furnished to the said Kona Sugar Co. Ltd are now fully sit forth in the account annexed to the notice of lien, a copy of said notice of lien and account being hereto attached, marked Echibit "B" and made a part hereof. That there is now due and owing by the said Kona Sugar Co Ltd. to the said Plaintiff, under and by virtue of the aforesaid contract the sum of $37,044.53 (said sum being the price agreed upon by the said Kona Sugar Co. Ltd to be paid for the goods merchandise and materials he einabove referred to togetther with legal interest on said 37,044.53 from March 1st 1902. That the said goods merchandise & materials, thus by the said plaintiff furnished to the said Kona Sugar Co. Ltd, were to be used and have in fact been used by the said Kona Sugar Co. Ltd., in the construction and equipment of a certain railroad located on the plantation of the said Kona Sugar Co. Ltd., in the District of North Kona, Island and Territory of Hawaii. That the plaintiff has done and performed all conditions and things by it required to be done or performed under the said contract and that all events have happened, and all times have elapsed to entitle the plaintiff to its performance by the said Kona Sugar Co Ltd of its portion of
the said contract, but that the said Kona Sugar Co. Ltd,
384 and the said M. F. Scott as Receiver of the Kona Sugar
Co. Ltd, though often thereto requested by the said plaintiff, have and each of them has at all times neglected and refused and still neglect and refuse to pay the said $37,044.53 or any part thereof, although the said sum is now justly due and owing.

And the plaintiff claims a lien on all that certain, embankment, grading and filling, and track, switches, buildings cars, engines and other property forming and constituting the line, roadway and equipment of the said railroad of the Kona Sugar Co Ltd. for the said $37,044.53 and interest, thus due and owing as aforesaid, the plaintiff having filed in writing in the office of the Clerk of the Circuit Court of the Third Judicial Court of the Territory of Hawaii, within which circuit said property is situated, notice of lien having been filed on the 14th day of May A. D. 1902 and within three months from the date hereof and a copy of said notice having been served upon the owners of said property. And plaintiff says that due demand has been made upon the said defendants for the payment of the lien aforesaid, but that the said defendants have neglected and refused and still neglect and refuse to pay the same or any part thereof.

And for a further and separate cause of action the plaintiff shows: That it is a corporation duly organized and existing under and by virtue of the laws of the state of Louisiana, having its principal place of business in the city of New Orleans state of Louisiana. That the said defendant herein, M. F. Scott is a resident of the District of North Kona, Island and Territory of Hawaii and within the jurisdiction of this Honorable Court. That the said Kona Sugar Co. Ltd is a corporation duly organized and existing under the laws of the Territory of Hawaii, having an office in Honolulu, in
385 said Territory and doing business in the, District of
North Kona, Island and Territory of Hawaii and within the jurisdiction of this Honorable Court. That the said M. F. Scott was upon the 28 day of March A. D. 1902, appointed by this Honorable Court as the Receiver of the said Kona Sugar Co Ltd and that he is now acting as receiver of said Company. That the plaintiff herein claims of the defendants herein the sum of $37044.53 with legal interest thereon, for that the said Kona Sugar Co. Ltd on the 1st day of March A. D. 1902, was and now is indebted to the plaintiff in the said sum of 37,044.53 for goods, merchandise and materials furnished by the said plaintiff to the said Kona Sugar Co. Ltd at the request of the said Kona Sugar Co. Ltd. according to the account annexed to the notice of lien, a copy of said notice of lien and account, marked Exhibit "B", being hereto annexed and made a part hereof, and which is now fully referred to hereunder, said account being for materials furnished by the plaintiff for use by the said Kona Sugar Co Ltd., in, and which were in fact used by the said Kona Sugar Co Ltd, in the construction and equipment of a certain railroad located on the plantation of the said Kona Sugar Co Ltd in the District of North Kona, Island of Hawaii, Territory of Hawaii. That the said $37/044.53 is the price agreed to be paid for the said goods, merchandise and materials by the said Kona Sugar Co Ltd.

And the Plaintiff says that the said $37044.53 together with interest thereon from March 1st 1902 is now justly due and owing to the said plaintiff by the said defendant

the Kona Sugar Co Ltd, and that the said defendants herein and each of them promised to pay such indebtedness to said plaintiff; but that though often thereto requested they have and each of them has neglected
386 and refused and still neglects and refuse to pay the said sum or any part thereof.

And the Plaintiff claims a lien on all that certain cutting embankment, grading and filling, and track switches, buildings cars and engines and other property forming and constituting the line, roadway and equipment of the said railroad of the said Kona Sugar Co Ltd for the said $37,044.53 and interest thus due and owing as aforesaid the plaintiff having filed in writing in the office of the Clerk of the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, within which ~~court~~ Circuit the said property is situated, notice of lien as provided by law, said notice of lien having been filed on the 14th day of May A. D. 1902 and within three months from the date hereof, and a copy of said notice having been served on the owners of the said property.

And plaintiff says that due demand has been made upon the said defendant for the payment of the lien aforesaid, but that the said defendants have and each of them had neglected and refused and still neglect and refuse to pay the same or any part thereof.

Wherefore the plaintiff prays that the process of this Court may issue to summon the defendants to appear and answer this complaint before a jury of the country at the October Term, A. D. 1902 of this Court, unless sooner disposed of by judicial authority, and that the plaintiff may have judgment against the said defendants for the said sum of $37044.53 claimed, and said lien for the full amount thereof, together with interest thereon and for the enforcement of the said lien for the said sum, together with its attorneys' fees and costs in this behalf sustained.

(Sig) WILLIAM W. BIERCE, LTD
By its attorneys
KINNEY BALLOU & MCCLANAHAN

Dated Honolulu, T. H. July 38th A. D. 1902

(Sig. H. A. B

387 Honolulu, Oahu.
Territory of Hawaii. } ss.

H. A. BIGELOW, being first duly sworn on oath deposes and says:

That he is one of the members of the firm of Kinney, Ballou & McClanahan, Attorneys for William W. Bierce, Ltd the above named plaintiff; that the said plaintiff is a corporation organized and existing under the laws of the state of Louisiana and having its principal place of business in New Orleans in said state; that the said firm of Kinney, Ballou & McClanahan is the only representative of the said William W. Bierce, Ltd., within this jurisdiction and the only person or persons able to make affidavit to the complaint herein.

That he has read the foregoing complaint and knows the contents thereof and deposes on behalf of the said William W. Bierce, Ltd that to the best of his knowledge and belief all the matters and things therein set forth are true.

(Sig) H. A. Bigelow

Subscribed and sworn to before me this 29th day of July, A. D. 1902.

(Sig) J. Louis Horner

(Seal) *Notary Public, First Judicial Circuit Territory of Hawaii.*

EX A

388-393 (Here follows the same instrument shown as Exhibit "A" on pages 212-218 and 244-249 of original transcript, and as Exhibit "B" on pages 260-265 of original transcript, ante pp. 145-150 which to avoid reprinting is here omitted.)

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EXHIBIT B.

In the Circuit Court of the Third Judicial Circuit,

Territory of Hawaii.

William W. Bierce, Ltd.,
Plaintiff,
—*vs*—
Kona Sugar Co Ltd.,
Defendant.

NOTICE OF LIEN OF MATERIALMAN.

To M. F. Scott, Clerk of the Circuit Court of the Third Judicial Circuit, Territory of Hawaii:

Notice is hereby given that William W. Bierce, Ltd., a corporation organized and existing under and by virtue of the laws of the State of Louisiana and with headquarters in the city of New Orleans, State of Louisiana, has a lien on certain property of the Kona Sugar Co. Ltd., a corporation organized and existing under the laws of the Territory of Hawaii and doing business in the District of North Kona, Island of Hawaii, Territory of Hawaii and in Honolulu, Island of Hawaii, Oahu, Territory of Hawaii, and having its principal office in said Honolulu, said property being described as follows:

All that certain cutting, embankment, grading and filling, and track, switches, buildings, cars, engines and other property forming and constituting the line, roadway and equipment of the single track railroad of the Kona Sugar Co. Ltd., said railroad being located on the plantation of the said Kona Sugar Co. Ltd., in the District of North Kona, Island of Hawaii, Territory of Hawaii and its situation being more
395 particularly described as follows: Beginning at the mill of the said company and thence running in a general southerly direction at an elevation approximately of 686 feet above the level of the sea for a distance of seven miles, more or less, from said place of beginning;

Said lien being for the sum of $37,044.53 and interest thereon and being for materials furnished by the said William W. Bierce, Ltd., to the said Kona Sugar Co. Ltd., for the construction and equipment of the said railroad, the said materials being more fully set forth and specified in the Schedule hereto attached and made part hereof, said schedule being a correct account of the amount and value of the said materials.

Said materials having been furnished during a period extending to the first day of March, A. D. 1902.

On which said lien on said railroad and property said William W. Bierce, Ltd., will enforce a payment of their said claim of $37,044.53 with interest and the costs of this notice by instituting suit therefor in the courts of this Territory as authorized by law in such case made and provided, unless said lien shall be sooner satisfied by the payment of said claim and the costs of this proceeding.

William W. Bierce, Ltd.,
By its Attorneys
(Sig) Kinney Ballou & McClanahan
C. S. D.

Dated, Honolulu, T. H., May 12th, A. D. 1902.

396

SCHEDULE.

Materials furnished by William W. Bierce, Ltd., to Kona Sugar Co. Ltd.,

550 Tons steel T rails, weight 35 lb. to the yeard, at 46.40 per ton of 2240 lb.	25520.00
Joints for laying said rails	2281.00
Railroad track spikes to lay said rails	1440.00
10 sets 35 lb. split switch material complete	545.00
16 cars, 28 ft. long 7 ft. wide for 3 ft. gauge track $340.00 per ton car	5440.00
1 (one) 9x14, Class "A" saddle tank locomotive	3755.00
1 (one) 10x16, Class "M", back saddles tank locomotive	5495.00
1 (one) Howe Narrow Gauge Track Scale, capacity 25 tons	500.00
1 set re-railers	25.00
4 Track gauges, 3 ft.	8.00
1 rail bender	35.00
1 Track drill	12.00
1 Section Car with seats	90.00
2 Jacks	36.00
	45182.00

397 IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

Territory of Hawaii

Wm. W. Bierce Ltd,
Plaintiffs
v.
M. F. Scott, Receiver of the Kona Sugar Co. Ltd, and The Kona Sugar Co. Ltd.
Defendants.

(Stamps)
Term Summons

The Territory of Hawaii:

To the High Sheriff of the Territory, or his Deputy; the Sheriff of the Island of Hawaii, or his Deputy, or any constable in the Territory of Hawaii. or his deputy:

You are commanded to summon M. F. Scott Receiver of the Kona Sugar Co Ltd, and the Kona Sugar Co Ltd. Defendants in case they shall file written answer within twenty days after service hereof, to be and appear before the said Circuit Court at the October Term thereof to be holden at Kohala Island of Hawaii on Wednesday the 1st day of October next, at 10 o'clock A. M., to show cause why the claim of W. W. Bierce Ltd Plaintiff should not be awarded to him pursuant to the tenor of the annexed Petition.

And you are commanded to And have you then there this Writ with full return of your proceedings thereon.

WITNESS Hon. W. S. Edings Judge of the Circuit Court of the Third Circuit, at Kailua this 1st day of August 1902.

(Sig) J. P. CURTS
(Seal) *Clerk.*

Served the within summons as follows:

On M. F. Scott at Kailua N. Kon this 21 day of August 1902 By delivering to him a certified copy hereof, and of the Petition hereto annexed, and at the same time showing him the original as directed.

Dated Kailua, N. Kona Aug 21 1902

(Sig) J. K. NAHALE
Deputy Sheriff.

(Endorsed) Circuit Court Third Circuit W. W. Bierce Ltd. Plaintiff v. M. F. Scott, Receiver of the Kona Sugar Co Ltd and the Kona Sugar Co. Ltd Term Summons Issued at 5 o'clock P. M. August 1 1902 J P. Curts Clerk. Returned at 11:30 o'clock A. M. Sept 4 1902 J. P. Curts Clerk.

398 Written on the back of said Term Summons are the following endorsements:

Served the within Summons as follows: On M. F. Scott at Kailua, N. Kona this 21 day of August 1902 By delivering to him a certified copy hereof, and of the Petition hereto annexed, and at the same time showing him the original as directed.

Dated Kailua, N. Kona Aug. 21, 1902.

(Signed) J. K. Nahale
Deputy Sheriff.

Served the within Summons as follows:

On the Kona Sugar Company Limited through J. M. McChesney its President at Honolulu, Oahu on the 25th day of August A. D. 1902 by delivering to said J. M. McChesney President of said Kona Sugar Co. Ltd. a certified copy hereof and of the petition hereto annexed and at the same time showing him the original as directed.

Dated, August 25, 1902.

(Signed) Albert McGurn
Deputy Sheriff.

(Endorsed): Issued at 5 o'clock P. M. August 1, 1902. J. P. Curts Clerk. Returned at 11:30 o'clock A. M. Sept. 4, 1902. J. P. Curts Clerk.

399 CLERK'S CERTIFICATE.

I hereby certify that the foregoing Complaint, Affidavit of H. A. Bigelow, Ex. A, Ex. B., Schedule, and Summons are full true and correct copies of the Originals on file in the above entitled cause, in this Court.

J. P. Curts
(Seal) *Clerk Circuit Court Third Circuit ty. of Hawaii.*

EXHIBIT 3.

IN THE CIRCUIT COURT, THIRD JUDICIAL CIRCUIT,

Territory of Hawaii.

At Chambers.

R. W. McChesney, J. M. McChesney and F. W. McChesney carrying on business together in co-partnership under the name of McChesney & Sons,

Plaintiff,

—*vs*—

The Kona Sugar Co Ltd. a corporation and the First American Savings & Trust Co Ltd, a corporation,

Defendants.

MOTION.

Now comes William W. Bierce Ltd by its attorneys, Kinney Ballou & McClanahan and moves this Honorable Court:

I

That it be allowed to file its petition in intervention in the above entitled cause said petition in intervention being hereto attached and made a part hereof

II

That upon the said petition in intervention being allowed, this Court will proceed forthwith to hear and determine the said petition in intervention and to grant the relief therein prayer for.

This motion is based upon the records in the case, and upon yhe facts set forth and verified in the petition in intervention annexed to this motion and made a part hereof, and each and all of said facts thus verified are hereby referred to and incorporated in this motion as a portion of the grounds upon which said motion is based.

WILLIAM W. BIERCE LTD
401 By its attorneys
KINNEY, BALLOU & MCCLANAHAN
(Initialed by S. H. D.)
Dated Honolulu T. H. November 21st 1902

402 IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT,

Territory of Hawaii.

At Chambers.

R. W. McChesney, J. M. McChesney and F. W. McChesney carrying on business together in co-partnership under the name of M. W. McChesney & Sons
Plaintiffs,

—*vs*—

The Kona Sugar Co Ltd, a corporation and The First American Savings & Trust Co Ltd, a corporation
Defendants

William W. Bierce, a corporation.
Intervenor

NOTICE.

To R. W. McChesney and J. M. McChesney being the surviving partners of the firm of R. W. McChesney & Sons, The Kona Sugar Co Ltd and The First American Savings & Trust Co Ltd, and to Messrs. Humphreys, Thompson & Watson as attorneys for the said Kona Sugar Co Ltd.

You and each of you will please take notice that upon Monday the 24th day of November A. D. 1902 at 10 o'clock a. m. in the forenoon, or as soon thereafter as counsel may be heard we shall present the motion hereto attached to the Honorable W. S. Edings Judge of the Circuit Court, Third Judicial Circuit, Territory of Hawaii, and ask that the same be allowed.

(Signed) KINNEY, BALLOU & MCCLANAHAN
(Initialed by S. H. D.)
Attorneys for William W. Bierce Ltd.

Dated Honolulu Territory of Hawaii, November 21st A. D. 1902.

Filed Nov 24th 1902 (Sig) J. P. Curts Clerk.

IN THE CIRCUIT COURT, THIRD JUDICIAL CIRCUIT

Territory of Hawaii.

At Chambers.

R. W. McChesney, J. M. McChesney and F. W. McChesney, carrying on business together in corpartnership under the name of McChesney & Sons,
Plaintiffs,
—*vs*—
The Kona Sugar Co Ltd, a corporation, and The First American Savings & Trust Co Ltd, a corporation,
Defendants
William W. Bierce Ltd a corporation
Intervenor

PETITION IN INTERVENTION

To the Honorable W. S. Edings, Judge of the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, sitting at Chambers:

Now comes William W. Bierce Ltd a corporation intervenes herein, and shows unto your Honor:

I

That it is a corporation organized and existing under and by virtue of the laws of the State of Louisiana, and having its principal place of business in New Orleans, in that State.

II

That McChesney & Sons are a co-partnership, having their principal place of business in Honolulu Territory of Hawaii and conducting a general merchantile business in said Territory.

III

That the Kona Sugar Co Ltd. is a corporation organized and existing under the laws of the Territory of Hawaii, 404 and having its principal place of business in Kona, Island and Territory of Hawaii; That the First American Savings & Trust Co Ltd, is a corporation organized and existing under the laws of the Territory of Hawaii, and having its principal place of business in Honolulu in said Territory

IV

That on February 21st, 1900, this intervenor and the said Kona Sugar Co Ltd. entered into a certain contract in writing which said contract the intervenor hereby asks to be allowed to introduce in evidence, at any and all hearings upon this petition and intervention or otherwise during the trial of said cause in the same manner and form and with the same effect as if said petition was hereto ahhexed and made a part hereof. That under and by virtue of said contract this intervenor furnished to the said Kona Sugar Co. Ltd. in accordance with the terms of said contract and at the price agreed upon in said contract, certain goods, merchandise and materials, which by the terms of said contract this intervenor was obliged to furnish to the said Kona Sugar Co Ltd.

V

That there is now due and owing by the said Kona Sugar Co Ltd. to the said intervenor under and by virtue of the aforesaid contract the sum of Thirty-seven Thousand and Forty four Dollars and Fifty-three cents ($37,044.53) (said sum being the price agreed upon by the said Kona Sugar Co Ltd, to be paid for the goods, merchandise and materials, herein above referred to) together with the legal interest on said Thirty Seven Thousand and Forty-four Dollars and fifty three cents ($37044.53) from March 1st 1902. That the said goods, merchandise and materials thus by the said intervenor furnished to the said Kona Sugar Co Ltd were to be used, 405 and were in fact used by the said Kona Sugar Co Ltd, in the construction and equipment of a certain railroad located on the plantation of the said Kona Sugar Co Ltd., in the District of North Kona, Island of Hawaii, Territor of Hawaii. That the said intervenor has done and performed all conditions and things by it required to be done and performed under the said contract, and that all events have happened, and that all times have elapsed to entitled the said intervenor to the performing by the said Kona Sugar Co Ltd of its portion of the contract, but that the said Kona Sugar Co Ltd, and its though often requested thereto by the intervenor, have, and each of them has, at all times neglected and refused, and still are neglecting and refusing to pay the said Thirty Seven Thousand and Forty-four Dollars and fifty three cents, or any part thereof, although the said sum is now due and justly owing.

VI

That upon the 14th day of May A. D. 1902, this intervenor filed with the Clerk of the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, a notice of lien upon that certain property of the Kona Sugar Co Ltd, described as follows:

All that certain cutting, embankment, grading and filling and track, switches, buildings, cars, engines and other property forming and constituting the line, roadway and equipment of the single track railroad of the Kona Sugar Co. Ltd. said railroad neing located on the plantation of the said Kona Sugar Co. Ltd. in the District of North Kona, Island of Hawaii, Territory of Hawaii, and its situation being more particularly described as follows: Beginning at the mill of the said company and thence running in a general southerly direction on an elevation of approximately of 686 feet 406 above the level of the sea for a distance of seven miles, more or less, from said place of beginning. a copy of said notice of lein being hereto attached, marked Exhibit "A" and made a part hereof, and that a copy of said notice of lien, together with a demand for the payment of the amount thereof was duly served upon the said Kona Sugar Co. Ltd and upon M. F. Scott he being at the time the Receiver of said Kona Sugar Co.

VII

That before three months after the completion of said structure and railroad upon which the lien was claimed in the manner and form hereinabove set forth by the said William W. Bierce Ltd, to wit: upon the 1st day of August, A. D. 1902, the said William W. Bierce Ltd. began a suit in the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, for the purpose of enforcing said lien upon the property herein above and in the notice of lien demanded; that said suit is still pending and undetermined in the said Circuit Court of the Third Judicial Circuit of the Territory of Hawaii.

VIII

That the said Intervenor William W. Bierce Ltd. is the owner holder and owner of Forty Five Thousand Dollars worth of the first mortgage bonds of said Kona Sugar Co. Ltd; which said bonds are secured by a mortgage upon all of the property of the said Kona Sugar Co Ltd. including that property herein below in paragraphs XI & XII of this petition and intervention more fully referred to and described.

IX

That on the 1st day of November A. D. 1902 R. W. McChesney J. M. McChesney and F. W. McChesney carrying on business together in copartnership under the name of Mc-
Chesney & Sons filed a petition in this Court against
407 the said Kona Sugar Co. Ltd. and the First American
Savings & Trust Co. Ltd wherein the petitioners prayed
inter alia that all the property of the said Kona Sugar Co Ltd, at that time in the hands of the Receiver should be sold subject to all liens of every kind and nature upon the said property at the date of said Receiver's appointment.

X

That thereafter, to wit: on the 5th day of November, A. D. 1902, a decree was filed in this Court in the above mentioned cause.

XI

That the said decree was not in conformity with the prayer of the aforesaid petition in this, that no such decree orders, adjudges and decrees inter alia that"

"the Receiver do, on the 18th day of November, 1902, "proceed to advertise for sale all and singular the goods, "chattels and effects, and property, real, personal and mixed, "and wheresoever the same may be situated, now in the "possession or under the control of the Receiver in the above "entitled cause, or to which the said Receiver may be entitled to poessess or control under and by virtue of the decree of

"this Court made and entered on the 28th day of March 1902,
"that is to say, all its, lands, tenements and hereditaments,
"all interest in lands, leases and leasehold interests, rights
"of way, railroads, railroad equipment, locomotives, flat
cars, cane cars, sugar mill, and equipment thereto belonging,
including cane trolleys and cane conveyors, machinery,
"buildings, lumber and materials, tools and implements,
"engines and cars, and all kinds of rolling stock, including
"wagons and all kinds of vehicles; crops, including cane, ready
"to be cut, and rattoon cane; harnesses, live stock, agree-
"ments and all franchises and rights of such company,
408 "and the good will of said company, and all other prop-
"erty of said company, now owned or hereafter to be
"owned by virtue and under authorit hereof, and that hav-
"ing advertised said property for sale at public vendee at
"the front door of the Court House of the Third
"Judicial Circuit, Territory of Hawaii at Kailua, Island of
"Hawaii, from the 18th day of November 1902, to the 2nd day
"of December, 1902, said Receiver do, on the fourth (4th) day
"December, 1902 both inclusive at the hour of 11 o'clock in
the forenoon, proceed to sell at public vendue, all the property
"of the Kona Sugar Co Ltd, herein above described" and
also that "said Receiver shall offer for sale as one parcel all
the property, real personal and mixed and premises, rights,
privileges and immunities and franchises of every kind and
description owned by said Company"

XII

That F. L. Dortch, as the Receiver of the Kona Sugar Co Ltd has advertised that he will upon Thursday, December A. D. 1902, at the hour of 11 o'clock A. D. at the front door of the Court House at Kailua, North Kona, Island and Territory of Hawaii, sell the following property of the Kona Sugar Co ltd, to wit, all the lands tenements and hereditaments all interests in lands, leases, and leasehold interests, easements, railroad, railroad equipments, locomotives, flat cars, cane cars, sugar mill and equipment, cane trolleys, cane conveyors, buildings, lumber, tools, aggricultural implements, wagons and other vehicles, growing crops, harness, live stock, choses in action, franchises, and all rights of said company, and the good will of said company, and all and every the property of whatsoever kind and nature, belonging to the said Kona Sugar Co Ltd., whether the same be mentioned

in the schedule below or not; and also all the lands now
409 held by the said Kona Sugar Co Ltd. whether specifically
mentioned in said advertisement of sale or not; that the said railroad, railroad equipment, locomotives, flat cars and cane cars are the same railroad, railroad equipment, locomotives, flat cars and cane cars upon which and such of which, the said William W. Bierce Ltd claim has filed and begun suit to enforce a lien in the manner and form, and upon the ground and claims hereinabove more specifically set forth

XIII

That each and all of said property this decreed by the said court to be sold as aforesaid, and advertised by the said F. L. Dortch, as Receiver of the Kona Sugar Co Ltd. to be sold in the manner and form above set forth, is the same property which was conveyed by mortgage to secure to this intervenor, amongst other, the payment of the bonds hereinabove more specifically set forth as being now held by the intervenor herein.

XIV

That by said decree, entered and filed in the above mentioned cause of R. W. McChesney, J. M. McChesney and F. W. McChesney carrying on business together in copartnership under the name of McChesney & Sons, plaintiffs against the Kona Sugar Co Ltd, a corporation and The First American Savings & Trust Co Ltd a corporation it is further provided that any party to this cause and also any intervening petitioner, and also the receiver may at any time apply to the court for further relief at the of this decree; as well as to such alterations thereof in respect to the terms and conditions of said sale or the distribution of the proceeds thereof or in any respect to any matter which may effect the rights of any of the parties to the cause, as may be just and proper.

Wherefore the intervenor prays:

410 That the decree mentioned and referred to in paragraph 14 of this petition may be modified and altered by adding in the fifth paragraph of said decree, after the words "under authority hereof; the following, to wit: saving and excepting from said sale, and from the operation thereof, all liens, rights, claims and interest of whatsoever name or nature of all bondholders, and of all persons claiming, asserting, or

seeking to enforce any lien of whatsoever name or nature, in, to or against the aforesaid property or any part thereof; that said decree may be further modified and altered by adding in the said fifth paragraph after the words "herein above described", the following words, to wit: "Saving and excepting from said sale and from the operation thereof, all liens, rights claims and interests as herein above set forth", so that said fifth paragraph of said decree, when thus modified and altered will read as follows:

"It is ordered adjudged and decreed that the Receiver do, on the 18th day of November, 1902, proceed to advertise for sale all and singular the goods, chattels and effects and property real personal and mixed, and wheresoever the same may be situate now in the possession or under the control of the Receiver in the above entitled cause, or to which the said Receiver may be entitled to possess or control under and by virtue of the decree of this court made and entered on the 28th day of March, 1902; that is to say, all its lands, tenements and hereditaments, all interest in lands, leases and leasehold interests, rights of way, railroads, railroad equipment, locomotives, flat cars, cane cars, sugar mill and equipment thereto belonging, including cane trolleys and cane conveyors, machinery, buildings, lumber and materials, tolls and implements, engines and cars, and all kinds of rolling
411 stock including wagons and all kinds of vehicles; crops
including cane ready to be cut, and rattoon cane, harnesses, live stock, agreements and all franchises and rights of said company, and the good will of said company, and all other property of said company now owned or hereafter to be acquired by virtue and under authority hereof, saving and excepting from said sale and from the operation thereof, all liens, rights, claims and interests of whatsoever name or nature of all bondholders, and of all persons claiming, asserting or seeking to enforce any lien of whatsoever name or nature, in, to or against the aforesaid property or any part thereof, and that having advertised said property for sale at public vendue at the front door of the court house of the Third Circuit, Territory of Hawaii, at Kailua, Island of Hawaii, from th the 18th day of November 1902, to the 2 day of December, 1902, said Receiver do on the fourth (4th) day of December 1902, both inclusive, at the hour of 11 o'clock in the forenoon proceed to sell at public vendue all the property of the Kona Sugar Co Ltd, herein above described, saving and excepting from said sale, and from the operation thereof, all

liens, rights claims and interests as herein above set forth, for the purpose of paying the debts and liabilities incurred by the Receiver in the Managements and control of said property, and also such other proper allowances, compensations, disbursements and attorney's fees of the Receiver, as may be directed to be paid by the order of the Court; and to satisfy, liquidate and discharge, so far as may be, and in the order of their legal preferences all liens claims, or demands, legal or equitable, against the Kona Sugar Co Ltd.

—11—

That the said decree be further modified and altered by adding in the sixth paragraph thereof, in section 5 in said 412 sixth paragraph, after the last word in section 5, to wit: the word "company", the following words, to wit, "saving and excepting from said sale and from the operations thereof, all liens, rights, claims and interests, as in the manner and form herein above more fully set forth in the last preceding paragraph of this decree", so that the said fifth section of the sixth paragraph of said decree will, when thus modified and altered, read as follows:

"Said Receiver shall offer for sale as one parcel all the property real, personal and mixed and premises, rights, privileges, and immunities and franchises of every kind and description owned by said company, saving and excepting from said sale and from the operation thereof, all liens, rights, claims and interests, as in the manner and form herein above more fully set forth in the last preceding paragraph of this decree."

111

That the said decree may be further modified and altered in the tenth paragraph thereof, said paragraph being next to the last paragraph of the aforesaid decree, by adding thereto after the words "franchises appertaining thereto", the following words, to wit: "and subject to the same liens, rights, claim and interests of whatsoever name or nature that the property, or any part thereof was subject to at the time of said xale, so that the said paragraph when thus modified and altered, will read as follows, to wit:

"And it is further ordered, adjudged and decreed that the purchasers or purchaser of the property herein and hereby ordered to be sold shall after the delivery of the same to them and the execution of said deeds hold, possess and occupy the said premises property and all the rights, privileges, immunities and franchises appertaining thereto, and subject to the same liens, rights, claims and interest of whatsoever name 413 or nature, that the property or any part thereof, was subject to at the time of said sale, as fully and completely as the said Kona Sugar Co Ltd now holds or enjoy the same, or is entitled to hold and enjoy the same."

1V

That this Court may grant to the intervenor such other or further relief whether herein specifically prayed for or not, as the exigencies, of the case and justice and equity may require.

And your intervenor ever will pray

W. W. BIERCE LTD
by its attorneys
(Sig) KINNEY, BALLOU & McCLANAHAN
& H. A. BIGELOW
per S. H. D.

Dated Kailua, Hawaii T. H.
November 24th A. D. 1902

Kinney, Ballou & McClanahan and H. A. Bigelow attorney for William W. Bierce Ltd Intervenor.

414 Kailua, Hawaii
Territory of Hawaii. } ss.

S. H. Derby, being duly sworn, on oath deposes and says: That he is an attorney duly engaged in the practice of law in the office of Kinney, Ballou & McClanahan, in the City of Honolulu, Territory of Hawaii that the said Kinney Ballou & McClanahan and H. A. Bigelow, are attorneys for William W. Bierce Ltd the above named intervenor, that the said William W. Bierce Ltd is a corporation duly organized and existing under and by virtue of the laws of the State of Louisiana, and having its principal place of business in New Orleans, in said state; that the said firm of Kinney, Ballou & McClanahan are the representatives of the said William W. Bierce Ltd within this jurisdiction that he has read the foregoing complaint and knows the contents thereof, and deposes on behalf of the said William W. Bierce Ltd that to the best of his knowledge and belief all the matters and things therein set forth are true.

(Sg) S. H. DERBY

Subscribed and sworn to before me this 24 fay of Nov. A. D. 1902.

(Sig) J. P. CURTS
(Seal) *Clerk Third Judicial Circuit,*
Territory of Hawaii.

(Endorsed) Filed Nov. 24, 1902. J. P. Curts, Clerk.

415 The findings of fact and conclusions of law and the orders of said Circuit Court of the First Judicial Circuit aforesaid allowing the same, in said cause, which were filed and entered of record in said Court on the 15th day of March, 1904, and are in the words and figures following, to-wit:

416 IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT

Territory of Hawaii.

December 1903 Term.

——oOo——

William W. Bierce, Limited, a corporation,
Plaintiff,
vs.
Clinton J. Hutchins, Trustee,
Defendant.
} Replevin.

Plaintiff's Request for Findings of Fact and Conclusions of Law.

Findings of Fact.

1.

That William W. Bierce Limited, plaintiff and the Kona Sugar Company, Limited, on February 21st, 1900, entered into the contract of that date attached to the deposition of Columbus Bierce, read in evidence.

2.

That the personal property sued for in this action was duly shipped to Honolulu, bills of lading having been taken out in the name of the plaintiff, but said property did not pass into the possession of the Kona Sugar Company, Limited, until after the contract of March 13th, 1901, was entered into.

417 3.

That on March 13th 1901, plaintiff and the Kona Sugar Company, Limited, entered into the contract of that date attached to plaintiff's complaint as Exhibit "A".

4.

That the payment of $10,000 under the contract of March 13th, 1901, and the giving of the note for $37,044.53 secured by the bonds of the Kona Sugar Company, Limited, was intended to be and was in settlement of the contract of February 21st 1900, and said cash and said note and bonds were not given nor were they intended as the consideration for the purchase price of the materials sued for.

5.

That the condition precedent, the performance of which was to divest the plaintiff of title to the property sued for, was intended by the parties to be the payment of the note of $37,044.53 given in settlement of the contract of February 21st, 1900.

6.

That the contract of March 13th, 1901, was an entire contract, and intended so to be, for a lump sum consideration which consideration was incapable of being apportioned so as to make possible the ascertainment of the price of the lienable and non-lienable items thereof.

7.

That by entering into the contract of March 13th, 1901, the contract of February 21st, 1900, was intended to be settled and adjusted.

418 8.

That both the plaintiff and the Kona Sugar Company, Limited, intended said contract of March 13th, 1901, to operate as a conditional sale of the property sued for and not as a chattel mortgage, or an absolute sale with lien reserved in the vendor.

9.

That in view of all the circumstances of the case said contract of March 13th, 1901, was a conditional sale and not a chattel mortgage, or absolute sale with lien reserved in the vendor.

10.

That some of the property sued for in this action, including railroad rolling stock, was not in fact used in the construction of the railway of the Kona Sugar Company, Limited, and was not lienable.

11.

That plaintiff did not at any time intend to, not did it in face waive its title to the property sued for, not did it intend to, or in fact make any election of remedies or rights so as to bar the bringing of this action.

12.

That plaintiff did not intend to nor did it in fact waive its title by bringing the action to enforce a materialman's lien against the Kona Sugar Company, Limited, and its Receiver.

13.

That the acts of the plaintiff prior to the bringing of this action did not amount to a rescission of the contract of
419 March 13th, 1901, and said contract as a matter of fact has not been rescinded.

14.

That the defendant attempted to purchase and did in fact take possession of the articles sued for, with knowledge both record and actual, of the plaintiff's claim and title thereto.

15.

That the actual value of said articles sued for was, at the time of bringing this action and now is, the sum of $22,000.

16.

That plaintiff has suffered damages from defendant's detention of the property in the sum of $1,045.00 being interest at six per cent. on said sum of $22,000 from June 1st 1903, to the date of Judgment herein.

17.

That each and every material allegation in plaintiff's complaint, has been established by the evidence.

The foregoing Findings of Fact is hereby allowed this 19th day of March, 1904.

(Signed) J. T. De Bolt
First Judge.

(Endorsed): Filed March 15th, 1904. P. D. Kellett, Jr., Clerk.

(Written on the back of p. 419 is the following) Circuit Court First Circuit William W. Bierce Limited Plaintiff vs Clinton J. Hutchins Defendant. Plantiff's request for findings of fact and conclusions of law Filed Mch 15. 1904 P D Kellett Jr Clerk

420 IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT

Territory of Hawaii.

December 1903 Term.

—oOo—

William W. Bierce, Limited, a corporation,
Plaintiff,
vs.
Clinton J. Hutchins, Trustee,
Defendant.
} Replevin.

Plaintiff's Requested Conclusions of Law.

1.

That the defendant is not in a position to be able to deny or require proof of plaintiff's corporate existence.

2.

That the contract of February 21st, 1900, was adjusted and settled between the parties by the contract of March 13th 1901.

3.

That the contract of March 13th, 1901, between plaintiff and the Kona Sugar Company, Limited, was a conditional sale and not a chattel mortgage or absolute sale with lien reserved in the vendor, and under it plaintiff held title to the property sued for.

4.

That the payment of $10,000 under the contract of
421 March 13th, 1901, and the giving of the note therein for $37,044.53 secured by the bonds of the Kona Sugar Company, Limited, was in settlement and adjustment of the contract of February 21st 1900, and neither said cash or said note and bonds were given as a consideration for the purchase price of the materials sued for.

5.

That the condition precedent, the performance of which was to divest the plaintiff of title to the property sued for was the payment of the note of $37,044.53 which had been given as one of the considerations for the settlement of the contract of February 21st, 1900.

6.

That the contract of March 13th, 1901 was an entire contract for a lump sum consideration and contained lienable and non-lienable items.

7.

That the plaintiff has made no election of either remedies or rights so as to bar the bringing and maintaining of this action.

8.

That plaintiff is entitled to judgment against the defendant for the return of the property sued for and damages for its detention, and in the event of defendant's inability to return the said property, plaintiff is entitled to judgment for $22,000 its value, and also damages for its detention.

The foregoing Conclusions of Law is hereby allowed this 19th day of March, 1904.

(Sogned) J. T. De Bolt
First Judge.

(Endorsed): Filed Mch. 15, 1904. P. D. Kellett, Jr. Clerk.

(Written on the back of p. 421 is the following): Circuit Court Third Circuit Territory of Hawaii William W. Bierce Limited Plaintiff vs Clinton J. Hutchins Defendant Plaintiff's requested conclusion of law. Filed Mch 15, 1904 P. D Kellett Jr Clerk

422 The decision rendered by said Circuit Court of the First Circuit in said cause, which was filed and entered of record in said court on the 19th day of March, 1904, and is in the words and figures following, to-wit:

423 IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT

Territory of Hawaii.

December 1903 Term.

——oOo——

William W. Bierce, Limited, a corporation,
Plaintiff,
vs.
Clinton J. Hutchins, Trustee,
Defendant.
} Replevin.

Decision.

The Court having heard the above entitled cause does hereby find for the plaintiff for the recovery of the following property:

362 tons of steel T rails weighing 35 pounds to the yard.
Joints for laying 550 tons of steel T rails.
Railroad track spikes to lay 550 tons of said rails
10 set of 35 pound split switch material, complete
16 railway cars 25 feet long, 7 feet wide for 3 ft. gauge track.
One 9 x 14 Class "A" saddle tank locomotive
One 10 x 16 back saddle tank locomotive
One Howe Narrow gauge track scale, capacity 25 tons
1 set re-railers
Four track gaugers, 3 feet
One rail bender
One track drill
One section car with seats
Two Jacks

Together with damages for its detention from the 1st day of June 1903 to the date hereof, and in the event of the inability and failure of the defendant to forthwith make return of said property to the plaintiff, that the plaintiff
424 shall have judgment for the value of said property found
to be the sum of $22,000 and damages for its detention

from the 1st day of June 1903, found to be the sum of $1,045 and the costs of this action.

Dated, Honolulu, March 19th, A. D. 1904.

(Signed) J. T. DeBolt
First Judge of the Circuit Court of
The First Judicial Circuit.

(Endorsed): Filed March 19, 1904. P. D. Kellett, Jr., Clerk.

(Written on the back of p. 424 is the following): Circuit Court Third Circuit Territory of Hawaii. William W. Bierce Limited Plaintiff vs Clinton J. Hutchins Defendant Decision Filed March 19, 1904. P. D. Kellett, Jr. Clerk.

425 The judgment which was filed and entered of record in said cause by said Circuit Court of the First Judicial Circuit on the 19th day of March, 1904, and which is in the words and figures following, to-wit:

426 In the Circuit Court of the Third Judicial Circuit

Territory of Hawaii.

December 1903 Term.

——-oOo——

William W. Bierce, Limited, a corporation,
Plaintiff,
vs.
Clinton J. Hutchins, Trustee,
Defendant.
} Replevin.

Judgment.

This cause by stipulation of parties and consent of the above entitled Court coming on regularly to be heard at the January 1904 Term of the Circuit Court of the First Judicial Circuit, before the Honorable John T. DeBolt, on the 7th day of March A. D. 1904, and by stipulation of parties and consent of Court a jury having been waived and the above named plaintiff being present represented by its attorneys Messrs. Kinney, McClanahan & Cooper, and the above named defendant being present represented by his attorneys John W. Cath-

cart Esq., and Messrs. Castle & Withington, and said cause proceeding to trial on said last named day and continuing until Saturday the 12th day of March 1904, and the Court having heard the evidence adduced by the respective parties and being fully advised in that respect and argument hav-
427 ing been made by the respective counsel, and the Court being advised in all ways in the premises and having at the close of said argument rendered a decision in favor of the plaintiff and against the defendant for the return of the property sued for in said action together with the damages for its detention from the 1st day of June 1903 to the date hereof, or in default to make return of said property that said plaintiff recover the value thereof shown to be the sum of $22,000 together with damages as aforesaid for its detention;

Now, Therefore, it is ordered and adjudged that the above named defendant Clinton J. Hutchins, Trustee, forthwith return into the possession of William W. Bierce Limited or its authorized agent or attorneys the following described personal property now in the possession of said defendant:

362 tons of steel T rails weighing 35 pounds to the yard
Joints for laying 550 tons of steel T rails.
Railroad track spikes to lay 550 tons of said rails
10 set of 35 pound split switch material, complete
16 railway cars 25 feet long, 7 feet wide for 3 ft. gauge track
One 9 x 14 Class "A" saddle tank locomotive
One 10 x 16 back saddle tank locomotive
One Howe narrow gauge track scale, capacity 25 tons
One set re-railers
Four track gaugers, 3 feet
One rail bender
One track drill
One section car with seats
Two Jacks

and that said William W. Bierce Limited, do have and recover from said Clinton J. Hutchins Trustee, the sum of $1045.00 as damages for the detention of said property from the 1st day of June 1903, to the date hereof, together with the costs of this action taxed at the sum of $50.50.

And it is further ordered and adjudged that on failure of the said defendant Clinton J. Hutchins, Trustee, to forthwith make such return of said property to the possession of

said plaintiff; that said plaintiff William W. Bierce Lim-
428 ited have and recover from the said defendant Clinton J. Hutchins, Trustee the value of said property found and adjudged herewith to be the sum of $22,000 together with damages for its detention from the 1st day of June 1903 to the date hereof found and adjudged to be the sum of $1,045.00 together with the costs of this action taxed at the sum of $50.50.

Witness the Honorable John T. DeBolt, First Judge of the Circuit Court of the First Judicial Circuit.

Dated March 19th 1904.

(Signed) J. T. DeBolt
First Judge.

(Endorsed): Filed March 19, 1904. P. D. Kellett, Jr., Clerk.

(Written on the back of p. 428 is the following): Circuit Court Third Circuit Territory of Hawaii William W. Bierce Limited Plaintiff vs Clinton J. Hutchins Defendant Judgment Filed Mch 19, 1904. P. D Kellett, Jr. Clerk.

429 The defendant's bond for costs to accrue in the Supreme Court of the Territory of Hawaii in said cause, which said bond was filed in the office of the Clerk of said Circuit Court of the First Judicial Circuit on the 21st day of March, A. D. 1904, and is in the words and figures following, to-wit:

430 In the Circuit Court of the Third Judicial Circuit

Transferred to First Judicial Circuit,

Territory of Hawaii.

William W. Bierce, Ltd.,
Plaintiff,
vs.
Clinton J. Hutchins, Trustee,
Defendant.
} Replevin.
($1.00 Stamp.)

Bond.

Know All Men by These Presents:

That Clinton J. Hutchins, Trustee, as principal, and M. F. Scott as surety are held and firmly bound unto Henry Smith, Esq., Clerk of the Judiciary Department of the Territory of Hawaii, and his successor in office in the penal sum of One Thousand Dollars which sum, well and truly to be paid, the said principal and surety do hereby bind themselves, their respective successors, heirs, executors, administrators and assigns.

The conditions of the above obligation are as follows:

That whereas in an action in replevin brought in the Circuit Court of the Third Judicial Circuit of the Territory of Hawaii by William W. Bierce, Ltd.,, as plaintiff against Clinton J. Hutchins, Trustee, as defendant, on the 20th day of July A. D. 1903 (which action was subsequently by stipulation of said parties transferred to the Circuit Court of the First Judicial Circuit of the Territory of Hawaii for trial
before the Honorable J. T. DeBolt, Judge of said Court,
431 jury waived,) a decision was on the 12th day of March
A. D. 1904 / rendered by the Judge of said Circuit Court
of the First Judicial Circuit in favor of said plaintiff and against said defendant, and thereafter to wit on the 19th day of March A. D. 1904, Judgment was entered by the Clerk of said Court in accordance with said decision,

And Whereas said decision having been duly excepted to by the said defendant at the time of its being rendered and a notice of motion for a new trial having thereupon been duly given and the costs of said action having been paid by said defendant to the clerk of said Circuit Court of the First Judicial Circuit.

Now Therefore, if said motion for a new trial is perfected and all costs of motion in case said defendant fails to sustain the same are paid, and if such defendant shall not to the detriment of the plaintiff in said action remove or otherwise dispose of any property he may have liable to execution on such judgment, and if all costs are paid by the said defendant on writ of error or exceptions to the Supreme Court of the Territory of Hawaii, if any such writ of error or exceptions are taken, then this obligation shall be null and void, otherwise to remain in full force and effect.

This bond is given under Section 1458 of the Civil Laws of the Territory of Hawaii, and is intended to cover all costs until the final determination of said action.

(Signed) CLINTON J. HUTCHINS
Trustee
by Atty in fact.
" M. F. SCOTT
Surety.

Dated Honolulu, this 21st day of March A. D. 1904.
The foregoing bond is hereby approved.

(Signed) J. T. DEBOLT
Judge.

(Endorsed): Filed March 21st, 1904. George Lucas, Clerk.

432 The Order filed and entered of record in said cause in the Circuit Court of the First Judicial Circuit on March 21st, 1904, and which is in words and figures as follows, to wit:

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT,

(Transferred from Third Judicial Circuit.)

Territory of Hawaii.

William W. Bierce, Limited,
Plaintiff,
vs.
Clinton J. Hutchins, Trustee,
Defendant.
} Replevin.

Order.

It is hereby ordered that Clinton J. Hutchins, Trustee, Defendant above named, be and he is hereby allowed fifteen days from and after the completion of the transcript of evidence and proceedings in the above entitled cause by the official stenographer of said court, within which to prepare, present for allowance and file a bill of exceptions in said action.

Dated Honolulu March 21st., 1904.

(Sgd.) J. T. DEBOLT
First Judge Circuit Court,
First Judicial Circuit.

Endorsed: Filed March 21, 1904 (Sgd.) Henry Smith Clerk.

433 The motion and notice filed and entered of record in the Circuit Court of the First Judicial Circuit on March 21, 1904, which is in words and figures as follows, to wit:

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT

(Transferred to First Judicial Circuit)

Territory of Hawaii.

William W. Bierce, Limited,
Plaintiff,
vs.
Clinton J. Hutchins, Trustee,
Defendant.
} Replevin.

Motion for New Trial.

Comes now Clinton J. Hutchins, Trustee, the defendant above named, by his attorneys Cathcart & Milverton, and moves this Honorable Court that the decision and judgment in the above entitled action rendered and entered on the 12th day of March, A. D. 1904, and the 19th day of March, 1904, respectively, in favor of the above entitled plaintiff and against said defendant, be set aside, and a new trial granted on the following grounds, to wit:

For that the said decision and judgment were and are contrary to the law and the evidence, and the weight of the evidence, and for errors of law occurring during the trial of said action, which errors were duly excepted to by said defendant and such exceptions allowed by the court.

This motion is based upon all the pleadings, papers,
434 files and proceedings in said action, the decision of said
court, the record and judgment appertaining to said action, the official stenographer's notes of the evidence and proceedings taken at the trial of the same, and the minutes of the clerk of said court taken herein.

CLINTON J. HUTCHINS,
Trustee,
By (Sgd.) CATHCART & MILVERTON,
His attorneys.

Honolulu, T. H. March 19th 1904.

To Messrs. Kinney, McClanahan & Cooper, Attorneys for William W. Bierce, Ltd., the above named plaintiff:

Notice:

You and each of you will please take notice that on Wednesday the 23rd day of March A. D. 1904, at 9 o'clock A. M. of said day, or as soon thereafter as counsel may be heard, we shall present the foregoing motion before the Hon. J. T. DeBolt, First Judge of the Circuit Court, First Circuit.

(Sig.) CATHCART & MILVERTON
Attorneys for Defendant.

Dated Honolulu, T. H. March 21st 1904.

Endorsed: Filed March 21, 1904. (Sgd.) George Lucas Clerk.

435 Plaintiff's Motion Notice and Affidavits for a new re-delivery bond, dated March 22, 1904, Rec'd. and filed in the Circuit Court of the First Judicial Circuit.

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT

Territory of Hawaii.

December 1903 Term.

——-oOo-——

William W. Bierce, Limited, a corporation,
Plaintiff.
vs.
Clinton J. Hutchins, Trustee,
Defendant.
} Replevin.

Motion

Now comes the above named plaintiff, by its attorneys, Kinney, McClanahan & Cooper, and moves this Honorable Court for an order requiring defendant to forthwith file in this cause a new re-delivery bond; or failing in which

That execution issue on the judgment herein, unless defendant file a bond in double the sum of the Judgment herein as provided by Section 17 and 19 of Act 32 of the Session Laws of 1903;

This motion is based on the record in this cause including defendant's re-delivery bond, and on the affidavits of E. B. McClanahan, John F. Colburn and Percy M. Pond, hereto annexed referred to and made a part hereof.

Dated March 22nd, 1904.

(Sgd.) WILLIAM W. BIERCE LIMITED
By KINNEY, MCCLANAHAN & COOPER
Its attorneys.

436 IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT

Teritory of Hawaii.

December 1903 Term.

William W. Bierce Limited, a corporation,
Plaintiff.
vs.
Clinton J. Hutchins,
Defendant.
} Replevin.

Notice.

To Messrs. Cathcart & Milverton, and Messrs. Castle & Withington, attorneys for defendant:

Please take notice that the attached motion will be presented to the Honorable John T. DeBolt, First Judge of the Circuit Court of the First Judicial Circuit, on Friday the 25th day of March, A. D. 1904, at 9 o'clock A. M. of said day or as soon thereafter as counsel can be heard.

Dated March 22nd, 1904.

(Sgd.) KINNEY, McCLANAHAN & COOPER
E. B. M.
Attorneys for William W. Bierce Ltd.

437 IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT

Territory of Hawaii.

December 1903 Term.

——oOo——

William W. Bierce Limited a corporation,
Plaintiff.
vs.
Clinton J. Hutchins, Trustee,
Defendant.
} Repievin.

Affidavit of E. B. McClanahan

Honolulu, Oahu
Territory of Hawaii } ss.

E. B. McCLANAHAN, being first duly sworn on oath deposes and says:

That he is a member of the firm of Kinney, McClanahan & Cooper, attorneys for the plaintiff in the above cause; that he is acquainted with the facts and circumstances of the case; that part of the rails sued for in said action have, by means of part of the railroad spikes sued for therein, become attached to wooden sleepers fixed on land belonging to the Kapiolani Estate Limited, J. D. Paris, the Bishop Estate and others; that said Kapiolani Estate Limited, J. D. Paris and the Bishop Estate have, since the trial of said action, declared to affiant, that neither the Kona Sugar Company, Limited, or the said defendant C. J. Hutchins, Trustee, have any right, title or interest, written or otherwise, in or to their respective lands or any part thereof over and upon which
438 said rails lie and are so affixed, and that in the event of the judgment in this action being sustained by the Supreme Court, any attempt on the part of said C. J. Hutchins, Trustee, or any one acting on his behalf, to remove said rails or make a re-delivery thereof to the said William W. Bierce Limited, or any one acting on its behalf, will be stopped, opposed and contested by legal proceedings in the Courts of this Territory.

That affiant avers that the said defendant, Clinton J.

Hutchins, Trustee, is wholly unable to respond to the plaintiff in damages in the alternative judgment rendered herein; that defendant's re-delivery bond filed herein is of doubtful value in that it is a question whether under the terms thereof, a suit can be maintained against the Estate of Henry Waterhouse, deceased, the said Henry Waterhouse being a surety on said bond who has since its execution, died; that in any event it would be necessary for plaintiff in sueing on said bond to elect between a suit against the said Estate of Henry Waterhouse and a suit against the other surety on said bond, and by such forced election plaintiff would be deprived of its right under the law (See Section 1705 Civil Laws) to claim against and a right to have two, at least, sufficient sureties on defendant's re-delivery bond.

That affiant is informed and verily believes, that A. B. Wood one of the sureties on said bond has, since its execution disposed of a large part of his property in this Territory, and at this time is not the owner of sufficient property, subject to execution, as would satisfy a judgment which might be had against him in a suit on said re-delivery bond; that said A. B. Wood has left the Territory of Hawaii, and affiant is informed and believes that said A. B. Wood has left this
439 Territory permanently.

That in an action now pending in this Court between the Capital Building Company, as plaintiff, and Henry Waterhouse and A. B. Wood, as defendant, a subjoena was issued and served upon said A. B. Wood prior to his said departure from this Territory; that in defiance of said subpoena, which required the attendance of said Wood as a witness in said cause on April 4th, 1904, he the said Wood left this jurisdiction with no intention of obeying the mandate of said subpoena, which course on the part of said Wood is evidence of his intention of remaining permanently out of this Territory.

That the hearing on the probate of the Will of said surety Henry Waterhouse, is set for Monday April 4th, 1904, before this Honorable Court, and affiant is informed and believes it to be true that the statutory notice to creditors of said Estate will be first published on said April 4th, 1904; that there can be no claim under said re-delivery bond against the Estate of said surety Henry Waterhouse until after said defendant Clinton J. Hutchins Trustee, has failed to make a re-delivery of the property sued for; that said defendant

intends to and is now perfecting exceptions to the Supreme Court in said action, and will not deliver or attempt to deliver to the plaintiff said property, until said exceptions have been passed upon by the Supreme Court of the Territory; that, judging from the personal experiences of affiant in a somewhat extensive practice before the said Supreme Court in matters similar to the present case, and the present congested condition of the calendar of said Supreme Court, it will be more than six months after the 4th of April 1904,
before a decision on defendant's proposed exceptions can
440 be had, and therefore plaintiff's inchoate claim against
the said Estate of Henry Waterhouse on said re-delivery bond, which would only become absolute some time after a decision adverse to the defendant, would be barred, and plaintiff's remedy and right of action against said Estate wholly lost.

That affiant verily believes that defendant will not and cannot make a re-delivery of said materials sued for either now or at any other time; that though at the date of the execution of said re-delivery bond, both the sureties thereon were sufficient, affiant avers that at this time said A. B. Wood is an insufficient surety on said bond as well as Henry Waterhouse, and that said Clinton J. Hutchins, Trustee is not the owner of sufficient property to respond to the alternative judgment rendered in this action.

(Sgd.) E. B. McCLANAHAN.

Subscribed and sworn to before me this 23rd day of March A. D. 1904.

(Sgd.) GUSSIE H. CLARK
Notary Public First Judicial Circuit.

441 IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT

Territory of Hawaii.

December 1903 Term.

——oOo——

William W. Bierce, Limited, a corporation,
Plaintiff.
vs.
Clinton J. Hutchins, Trustee,
Defendant.
} Replevin.

Affidavit of John F. Colburn.

Honolulu, Oahu
Territory of Hawaii: } ss.

JOHN F. COLBURN, being first duly sworn on oath, deposes and says:

That he is Treasurer and Manager of the Kapiolani Estate Limited; that said Kapiolani Estate Limited is the owner of certain lands formerly forming a part of lands occupied for plantation purposes by the Kona Sugar Company, Limited, at Kailua, on the Island of Hawaii, Territory of Hawaii; that on a portion of said lands of said Kapiolani Estate Limited, rails forming part of the plantation railroad of the said Kona Sugar Company, Limited, have been affixed to the soil, and affiant claims said rails on behalf of the Kapiolani Estate Limited, as a part of the freehold; that neither said Kona
442 Sugar Company, Limited, Clinton J. Hutchins, Trustee,
or any one else, has any interest, right or title in or to the lands of said Kapiolani Estate Limited, upon which said rails lie, nor has said Kona Sugar Company, Limited, Clinton J. Hutchins, Trustee, or any one else, any right, title or interest in or to said rails, but that said rails are a part of the freehold and are claimed by the said Kapiolani Estate Limited; that any attempt on the part of the Kona Sugar Company, Limited, Clinton J. Hutchins, Trustee, or any one else, or any one acting for or on their behalf to remove or interfere with said rails so affixed, will, by the said Kapiolani Estate Limited, be contested by legal proceedings brought

for that purpose, and the claim of title and right of possession to said rails will be at all times asserted and defended by the Kapiolani Estate Limited.

That said rails referred to in this affidavit are a part of the property which affiant avers is the subject matter of a certain suit between "William W. Bierce Limited, as plaintiff, and Clinton J. Hutchins, Trustee, as defendant" recently tried before the Honorable John T. DeBolt, First Judge of the Circuit Court of the First Judicial Circuit.

(Sgd.) JOHN F. COLBURN

Subscribed and sworn to before me this 23rd day of March A. D. 1904.

(Sgd.) GUSSIE H. CLARK
Notary Public First Judicial Circuit.

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443 IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT

Territory of Hawaii.

December 1903 Term.

——oOo——

William W. Bierce, Limited, a corporation,
Plaintiff.
vs.
Clinton J. Hutchins, Trustee,
Defendant.
} Replevin.

Affidavit of Percy M. Pond.

Honolulu, Oahu
Territory of Hawaii } ss.

PERCY M. POND, being first duly sworn on oath deposes and says:

That for some years he has been intimately associated in business with A. B. Wood, one of the sureties on the redelivery bond filed in the above entitled action; that he knows the property belonging to said A. B. Wood within this jurisdiction; that the said A. B. Wood at the time of the execution of said bond possessed property within this jurisdiction, subject to execution, of more than the value of $25,000; that since

the date of the execution of said bond, said Wood has disposed of the larger part of his property within this
444 jurisdiction, and at this time is not the owner of property within this jurisdiction, subject to execution, of the value of more than $10000.00

That since the execution of said re-delivery bond, the said A. B. Wood has removed from the Territory of Hawaii with his family and does not intend longer to reside within said Territory.

(Sgd.) PERCY M. POND

Subscribed and sworn to before me this 23rd day of March, A. D. 1904.

(Sgd.) GUSSIE H. CLARK
Notary Public First Judicial Circuit.

Endorsed: Filed March 24, 1904. (Sgd.) P. D. Kellett, Jr. Clerk.

445 The order filed and entered of record in said cause in the Circuit Court of the First Judicial Circuit on March 23rd., 1904, which is in words and figures as follows, to wit:

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT

(Transferred to First Circuit)

Territory of Hawaii.

——oOo——

William W. Bierce, Limited,
Plaintiff.
vs.
Clinton J. Hutchins, Trustee,
Defendant.
} Replevin.

Order

Plaintiff having in open court at the hearing of defendant's motion for a new trial herein on March 23rd 1904, objected to the sufficiency of defendant's bond on said motion and in appeal and it appearing to the Court that said objection is well taken and should be sustained,

Now Therefore it is hereby Ordered that said objection be sustained and that said defendant file a sufficient bond in a sum not less than the amount of the judgment herein on or before March 31st, 1904, in place of said bond before mentioned.

March 23rd. 1904.

(Sgd.) J. T. DEBOLT
First Judge of the Circuit Court
of the First Circuit.

Endorsed: Filed March 23d 1904, (Sgd.) P. D. Kellett, Jr. Clerk.

446 The affidavit and exception filed and entered of record in said cause in the Circuit Court of the First Judicial Circuit on March 28th, 1904, which are in words and figures as follows, to wit:

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT,

(Transferred to First Judicial Circuit)

Territory of Hawaii.

William W. Bierce, Limited, a corporation, *Plaintiff.*
vs.
Clinton J. Hutchins, Trustee, *Defendant.*
} Replevin.

Affidavit of Jno. W. Cathcart.

Island of Oahu,
Territory of Hawaii. } ss,

JOHN W. CATHCART being first duly sworn deposes and says;

he is one of the attorneys for the defendant in the above entitled action, and as such was present and appeared for him upon the trial of said cause lately had before the Circuit Court of the First Judicial Circuit, Territory of Hawaii, Honorable J. T. DeBolt, Judge, Presiding; that the testimony adduced by the plaintiff upon the trial of said cause which testimony was uncontradicted, shows that the rails claimed by the plaintiff were laid upon land which said defendant

herein held and possessed under leases or deeds of
447 rights of way from the owners thereof, including the Kapiolani Estate and the Bishop Estate; that said evidence showed that none of these rails were laid upon land owned or controlled by J. D. Paris.

Affiant further says that the said defendant is and has been ever since the confirmation of sale of the property of the Kona Sugar Company on the 1st day of June, A. D. 1903 the owner and holder of a lease from the Kapiolani Estate Limited, for the land owned by the Kapiolani Estate on which the rails referred to in the affidavit of John F. Colburn on file in this cause, lie, and that said lease has yet a long term of years to run.

Affiant further says that he is informed and believes and so states the fact to be that J. D. Paris referred to in the affidavit of E. B. McClanahan, filed herein, has not been in Honolulu since the trial of said cause but has been in the District of Kona, Island of Hawaii; and affiant further states on information and belief that the said E. B. McClanahan has not been off the Island of Oahu since the trial of said action.

Affiant further says that he is informed and believes that the said Bishop Estate has since the trial of this cause taken no action in reference to the rails which are laid upon land owned by it.

Affiant further says that he is compelled to go to the Island of Kauai to attend the Circuit Court of the Fifth Judicial Circuit, on the trial of a cause in which he was retained several months ago, and that it is impossible for him to procure the postponement of said action; that the defendant above named is absent from the Territory of Hawaii
448 but is expected to return on the 30th day of this month.

Affiant further says that he will not be able to return to Honolulu from Kauai until the 2nd, day of April following.

That affiant has taken proceedings to appeal from the judgment of this court in the above entitled cause for no purpose of delay or vexation, but because he believes that said appeal is meritorious and that the judgment herein rendered is contrary to the law and evidence and against the weight of the evidence.

But affiant says that should the judgment of this court be affirmed upon said appeal that the said defendant, as affiant verily believes can make a delivery of all of said material so ordered to be redelivered, and that he will make such delivery.

Affiant further says that he has no knowledge of information as to the personal financial responsibility of the said defendant Clinton J. Hutchins or whether or not personally he can respond to the alternative money judgment in this cause, but affiant states on information and belief that said defendant Clinton J. Hutchins, Trustee, is in a position to respond to the alternative money judgment in said cause, and to pay the same together with all damages and costs in this action incurred in the event that the property cannot be re-delivered.

(Sgd.) JNO. W. CATHCART

Subscribed and sworn to before me this 24th day of March, 1904.

(Sgd.) P. H. BURNETTE
Notary Public First Judicial Circuit,
Territory of Hawaii.

Endorsed: Filed March 28, 1904. (Sgd.) P. D. Kellett, Jr., Clerk.

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449 IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT,

(Transferred from Third Judicial Circuit)

Territory of Hawaii.

William W. Bierce, Limited, A Corporation,
Plaintiff,
vs.
Clinton J. Hutchins, Trustee,
Defendant.
} Replevin.

Exception.

Comes now the defendant above named by his attorneys Cathcart & Milverton and excepts to the ruling and order of the Court made this 28th day of March, A. D. 1904, granting the motion heretofore made by the plaintiff to wit, on the 22nd day of March, A. D. 1904, for an order requiring said defendant to file a new re-delivery bond in said action.

Dated, this 28th day of March, A. D. 1904.

(Sgd.) CATHCART & MILVERTON
Attorneys for Defendant.

Endorsed: Filed Mch. 28, 1904. (Sgd.) Geo. Lucas, Clerk.

450 The order filed and entered of record in said cause in the Circuit Court of the First Judicial Circuit on the 29th day of March, 1904, which is in words and figures as follows, to wit:

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT

Territory of Hawaii

December Term 1903.

—oOo—

William W. Bierce Limited a corporation.
Plaintiff.
vs.
Clinton J. Hutchins, Trustee,
Defendant.
} Replevin.

ORDER REQUIRING DEFENDANT TO FILE NEW RE-DELIVERY BOND

This matter having been brought on by motion of the plaintiff and coming on for hearing on this 28th day of March A. D. 1904, and the defendant having filed an affidavit against the allowance of said motion and argument having been made by respective counsel, and the Court being advised in the premises, and having decided that the present re-delivery bond is insufficient;

It Is Ordered that the above named defendant Clinton J. Hutchins, Trustee, do file in this cause a new re-delivery bond with two sufficient sureties on or before the 2nd day of April A. D. 1904.

Dated March 28th, A. D. 1904.

(Sgd.) J. T. DEBOLT
First Judge of the Circuit Court of the First Judicial Circuit.

Endorsed: Filed March 29th, 1904, (Sgd.) P. D. Kellett, Clerk.

451 Which were all the records, papers, files, affidavits, exhibits, testimony, stenographer's notes, stenographer's transcript and other papers and documents in said cause mentioned and referred to in the Judge's certificate to said Bill

of Exceptions and which were thereby incorporated in and made parts of said Bill of Exceptions, and which were certified and sent up to the Supreme Court of the Territory of Hawaii at any time as such parts, or part, of said Bill of Exceptions in said cause.

452 Afterwards, to-wit, on the 11th day of November, A. D. 1904, in the October Term of the Supreme Court of the Territory of Hawaii of the year 1904, in the record of the proceedings thereof in said entitled cause, appears the following entry, to-wit:

453 SUPREME COURT OF THE TERRITORY OF HAWAII

October Term, 1904

W. W. Bierce, Limited
v.
C. J. Hutchins Trustee

Honolulu, Friday November 11th, 1904

CLERK'S MINUTES.

Exceptions from Circuit Court First Circuit

Before Frear C. J. Hartwell and Hatch J. J.

Kinney, McClanahan & Cooper, S. H. Derby and C. A. Galbraith appeared for the Plaintiff and J. W. Cathcart, Castle & Withington and W. L. Whitney for the defendant

At 2 P. M. Mr. Cathcart makes a statement of the case and argues.

At 3:45 P. M. the Court adjourns until Monday November 14th 1904

Monday November 14th, 1904

Mr Derby argues
Mr Galbraith argues
454 Mr Withington Replies
The Court takes the case under consideration.

455 Afterwards, to-wit, on the 28th day of January, A. D. 1905, in the October Term of said Supreme Court of the year 1904, there was filed in the Clerk's office of said Supreme Court the opinion of said Supreme Court in said entitled cause, which said opinion is in the words and figures following, to-wit:

456 IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

October Term, 1904.

———oOo———

W. W. Bierce, Limited
v.
C. J. Hutchins, Trustee.

Exceptions from Circuit Court, First Circuit.
Argued November 14, 1904.
Decided January 28, 1905.
Frear, C. J., Hartwell and Hatch, JJ.

Election between inconsistent remedies—Materialman's lien and replevin, in case of conditional sale.

An election of a remedy based on one theory, as, for example, in the case of a conditional sale, the enforcement of a materialman's lien, which assumes that the property is in the defendant, estops the plaintiff from afterwards pursuing a different remedy based on an inconsistent theory, as for example, an action of replevin, which assumes that the property is still in the plaintiff. An election is of rights rather than of remedies, though usually referred to as the latter, and, once made, is final, even though the action which evidences it is not carried to final judgment.

Id.—distinguished from mistake of remedies.

There is no election where the first remedy is adopted through ignorance of the facts or under some circumstances through ignorance of legal rights and would necessarily be ineffectual, but in this case the court cannot say that the
457 first remedy was adopted through such ignorance or that it would have been ineffectual.

Materialman's lien—Lienable and nonlienable items under entire contract.

A materialman's lien cannot be enforced for lienable items under an entire contract which covers non-lienable items also, but in this case the court holds that the prices of at least some of the lienable items is severable.

458 OPINION OF THE COURT BY FREAR, C. J.

This is an action for replevin of certain rails, cars, locomotives, equipments and materials of a railroad on the plantation of the Kona Sugar Co., Ltd., all of the property of which company had been purchased by the defendant at a receiver's sale. The plaintiff had delivered this railroad property to the company under an agreement clained by the plaintiff to be a conditional sale and so held by the trial judge, who heard the case, jury waived, and rendered judgment for the return of the property and $1030 damages and an alternate judgment for $22,000 in case the property should not be returned. The case is brought here by the defendant upon numerous exceptions. It has been argued and briefed at considerable length upon many points, but, in the view that we take, it will be sufficient to decide the single point as to whether the plaintiff is estopped from bringing this action of replevin, based on the theory that the title to the property is in itself, for the reason that it had previously elected to pursue an inconsistent remedy, namely, by bringing an action for the price of the property and to enforce a materialman's lien for the same, on the theory that the title to the property had passed to the vendee, the Kona Sugar Company.

It is a well settled principle of law that when a person adopts one of two or more inconsistent positions, whether in litigation or in pais, he cannot afterwards repudiate that position and adopt another. Any decisive act with knowledge of his rights and the facts determine his election and work an estoppel. In order to work an estoppel upon the
459 principle of election it is not necessary that the course first adopted should be pursued to completion or that it should result in success or satisfaction. When there are two or more consistent remedies they may be pursued successively at pleasure, and there will be no estoppel as to one until satisfaction has been obtained in another. But the rule is entirely different as respects inconsistent remedies or rather remedies based upon inconsistent theories. As soon as one is chosen the decision is final and no other inconsistent remedy can be pursued. The doctrine of election is not a mere matter of remedies, although it is often spoken of as if it were. It is really a matter of rights. The election is of rights rather than of remedies, the latter being the evidence of the former. These propositions do not seem to be questioned by the plaintiff and they are sustained by the cases cited infra.

Just how far a vendor may go in enforcing payment of the purchase price in the case of a conditional sale, which for present purposes we will assume this sale to be, is a matter of some diversity of opinion. It may be that a mere action for the price, although carried to judgment, should not be held to amount to an election where by the very terms of the contract the title is to remain in the vendor until payment of the price, for in such case an action alone for the price would not necessarily assume that the title had passed to the vendee inconsistently with the terms of the contract, and it would seem to be immaterial on the question of the transfer of title whether the payment, upon which such transfer would take place under the terms of the contract, were voluntary or forced through legal proceedings. Such was the holding in Thomason v. Lewis, 103 Ala. 426, 15 So. 460 830 (see also Campbell Mfg. Co. v. Rockaway Pub. Co., 56 N. J. L. 676), although perhaps the weight of authority is the other way. See cases infra. Be that as it may, it seems to be pretty generally held that if the action is accompanied by an attachment upon the property in question, there will be an estoppel by election, on the theory that an attachment recognizes the title as being in the vendee, although the contrary seems to have been held in Matthews v. Lucia, 55 Vt. 308, and perhaps others cases. See Crompton v. Beach, 62 Conn. 25; Smith v. Barber, 153 Ind. 322; Baliey v. Hervey, 135 Mass. 172; Fuller v. Eanes, 108 Ala. 464, 19 So. 366; Heller v. Elliott, 45 N. J. L. 564; Button v. Trader, 75 Mich., 295; Parke etc Co. v. White River etc Co., 101 Cal. 37; Ormsby v. Dearborn, 116 Mass. 386; Allbright v. Meredith, 58 Ohio St. 194. In Bank v. Thomas, 69 Tex. 237, it was even held that an endorsement of notes given for the purchase price amounted to an election which would preclude the right to reclaim the property, because a transfer of the notes did not amount to an assignment of the contract which provided for the retention of the title, but was a separation of the right to the price from the right to the property, which put it out of the power of the vendor to restore the notes in case he should desire to enforce the claim to the property. It was further held that the right to reclaim the property could not be restored by taking back the notes. In the present case the greater part of the purchase price was in the form of a note which was afterwards endorsed over by the plaintiff and later endorsed back to it, but we need express no opinion as to the effect of this. Certainly, an attempt to enforce a

mechanic's lien or materialman's lien in addition to the
461 allegations in assumpsit in that suit would indicate an
election to treat the title to the property as having passed to the vendee as much as an action of assumpsit coupled with an attachment would; and it has been so held by the supreme court of Alabama, which, as shown above, had held that an action alone, though carried to judgment, would not amount to an election. In Hickman v. Richburg, 122 Ala. 638, 26 So. 136, it was held that an attempt, though ineffectual, to establish a materialman's lien on property sold was an abandonment of the title reserved on the sale. Among other things the court said:

"It would seem from these authorities, that the question of election is not made dependent upon whether such election may be rendered effectual or not. Any unequivocal act on the part of the vendor, recognizing the title as being in the vendee, will preclude such vendor from afterwards setting up title in himself; and it is also well settled that, when an election between inconsistent rights is once made, it cannot be afterwards revoked. It is clear that the claimant in this case could not, under the statute, fix a materialman's lien upon property the title to which was in himself; and, when he filed his claim and statement with the probate judge for the purpose of creating a lien upon the lumber in question, this was an unequivocal act on his part to treat the lumber as the property of the defendant in execution, and of course, a waiver and abandonment of the title reserved on the sale."

The same court had made a similar decision previously. Lehman, Durr & Co. v. Van Winkle, 92 Ala. 443, 8 So. 870.

Cases such as Peninsula El. Co. v. Norris, 100 Mich. 496, and Case Mfg. Co. v. Smith, 40 Fed. 339, which hold that a provision in a contract for a retention of the title does not prevent the enforcement of a lien, are not inconsistent with these propositions. They, on the contrary, show
462 that, so far as such a provision is concerned, the remedy
by lien is effectual. They do not hold that, if such a remedy is pursued, the remedy by recovery of the property afterwards would not be precluded.

The plaintiff, without disputing the soundness of these views, seeks to show that they are inapplicable to the present case, upon the principle, which also is generally recognized, that the doctrine of election of remedies does not apply where the remedy first pursued would necessarily be ineffectual. There is a distinction between an election of remedies and a mistake of remedies. An election implies that there are two or more remedies as to which a choice may be made, but if there are not, although the party may suppose that there are, there can be no election. For instance, if one should attempt to enforce a mechanic's or materialman's lien on the theory that he was a subcontractor and it should turn out that he was a principal contractor, he would not be estopped from subsequently enforcing a lien as principal contractor. McLaughlin v. Austin, 104 Mich. 489. The institution of a suit mistakenly as subcontractor would not alter the relation between the parties. But the retention of title by a vendor is a privilege reserved for his benefit, which he may waive at pleasure, in which case the sale would become absolute, and if he does waive this right by taking steps inconsistent with it, he cannot afterwards retrace his steps and by his own act alone restore the title to himself. An attempt to enforce a lien would not, of course, preclude his resorting to other remedies to enforce the payment of the price, provided such remedies were consistent with the theory that the property was in the defendant. There is no election where a party attempts a remedy in ignorance of material facts or under certain circumstances even in ignorance of his legal rights, if the rights of the other party 463 are not prejudiced thereby or the rights of third parties have intervened. It is contended by the defendant that the Kona Sugar Company and its creditors were prejudiced by the conduct of the plaintiff in pursuing its remedy under the materialman's lien law for a long period without asserting a claim to the property. As to that no opinion need be expressed. A remedy is not ineffectual, however, within the meaning of this doctrine merely because, although it may be carried to final judgment, little or nothing may be realized or satisfatcion may not be obtained. In the present case the attorney who instituted the suit to enforce the materialman's lien testified in substance that that suit rather than an action to recover the property was brought in the first instance because the latter would have meant the collapse of the plantation at once on account of the railroad being essential to the taking off of a portion of the crop, and that it was discontinued because it was found that the plantation was running behind and it would be impossible to save any of its assets to pay anybody and useless to do anything to rehabilitate the plantation; and it is contended that the suit to enforce the lien was brought without much thought as to its effective-

ness or results. Similar contentions have been made in other cases without success. For instance, in Lehman, Durr & Co. v. Van Winkle, supra, as stated in Hickman v. Richburg, supra, "the vendor of the property had perfected a materialman's lien under the statute, but subsequently, by novated contract, in which the title to the property was reserved to the vendor until the payment of the purchase money, some of the purchase-money notes being extended beyond the time
within which the lien created under the statute could be
464 enforced, and which effectually destroyed the statutory
lien, it was held that a suit brought to enforce the lien subsequent to the novated contract, although afterwards dismissed on advice of counsel that there was no lien to enforce, such action was an unequivocal election to treat the property as that of the defendants, and wholly inconsistent with the retention of title in the vendors under the novated contract." It may be remarked in passing that the plaintiff in the present case relies upon a novated contract. In Richards v. Schreiber, 98 Ia. 422, it is claimed that an action for the price with an attachment was hastily brought by attorneys not fully advised of the facts and that it should not be treated as an election of remedies, but the court said that there was nothing to show that the action was not brought with full knowledge of all the facts and that it should be given the effect of an election to treat the property as sold absolutely. This might equally well be said in the present case. In Heller v. Elliot, supra, an action with attachment proceedings was held an election although it was discontinued. In that case the claim was made that the action was brought in ignorance of the facts and that therefore it should not be held to be evidence of an election, but it appeared by the evidence that the ignorance consisted merely in the supposition that the goods were out of reach and therefore could not be recovered specifically. In Hickman v. Richburg, supra, an election was held to have been made where the attempt to enforce the lien was ineffective because of the insufficiency of the preliminary statement that was filed for the purpose of securing a lien.

What the plaintiff relies upon principally, however, in order to show that there was no remedy under the materialman's
lien law is its contention that since some of the prop-
465 erty that was sold, as for instance, the cars and locomo-
tives, were nonlienable (because they were not and could not be attached to the realty), and since the contract was entire (because all of the goods were sold for a lump sum), the

price of the lienable items could not be severed and therefore no lien could be enforced as to any of the items. It is no doubt true that a lien cannot be enforced for lienable items under an entire contract which covers nonlienable items also, but in our opinion the contract in the present case is not such as to prevent a severance of the price of the lienable items from the price of the nonlienable items. The original contract of February 21, 1900, specifies in detail the various items and the prices of each item as well as other terms relating to delivery, payment, etc. The property was shipped in accordance with the terms of that contract, but the bills of lading and the property were not delivered for the reason that the drafts, which, with the bills of lading, were sent to a third party for collection, were not paid. A supplementary contract was accordingly made March 13, 1901, purporting to be "in settlement of the contract" previously made. Under this latter arrangement it was agreed that the Kona Sugar Company should pay $10,000 in cash and give its note for the sum of $37,044.53 payable in six months with interest at 7 1/2 per cent. and secured by the Kona Sugar Company's first mortgage bonds as collateral, whereupon the plaintiff was to deliver the property upon the condition that it should remain the property of the plaintiff until the payment of the note. This arrangement was carried out. The total amount, including the cash and the note under this arrangement, was $47,044.53. The aggregate amounts under the first arrangement, it is said, would be about $45,000. Probably the 466 difference between these two amounts covered expenses that had occurred meanwhile for storage or otherwise. The first of these contracts is made a portion of the second by express reference. They must be construed together. The first shows that the price for at least a portion of the lienable materials may be ascertained.

It may be added that it is at least doubtful whether, assuming that the contract was entire so far as now appears, the court should in the present case go into the question whether the attempt to enforce a lien might have terminated successfully in whole or in part, for it is impossible to say what evidence might have been introduced in that case. The plaintiff in instituting that proceeding was not ignorant of any of the facts. Its contention is that it did not know the law or rather that it did not take sufficient pains to ascertain the law. The ground, apparently in after-thought, now relied on to show that that suit would have been ineffectual is not one of the jurisdiction of the court or any proposition of law that would clearly show that those proceedings would have been ineffectual. It depends in part at least upon the evidence, and there is no certainty as to what that might have been in that case. That case was not carried to final judgment. It is hardly proper to try it in full as a side issue in the present case. Nor need we say whether, if a lien could not have been enforced because the contract was entire, there would be no estoppel by election.

It has been settled in this jurisdiction that the findings of fact of a trial court, jury waived, have the same force as the verdict of a jury, but upon the question of election in this case the material facts are undisputed and the construction of 467 the contracts, which are in writing, is a matter of law for the court. Under such circumstances this court may reverse the findings and judgment of the trial court, and it does so in this case.

The exceptions, so far as they raise the question of election, are sustained, the judgment of the trial court is reversed and the case is remanded to that court for such further proceedings as may be proper.

Kinney, McClanahan & Cooper,
S. H. Derby and
C. A. Galbraith,
for the plaintiff.
J. W. Cathcart,
Castle & Withington and
W. L. Whitney
for the defendant.
(Signed)
W. F. Frear
Alfred S. Hartwell
F. M. Hatch.

(Endorsed): Decision Filed January 28, 1905. George Lucas Clerk.

468 Afterwards, to-wit, on the 25th day of February, A. D. 1905, came the plaintiff in said entitled cause, by its attorneys, and filed in the Clerk's office of said Supreme Court its petition and motion for rehearing and re-argument in said cause, with the affidavit of S. H. Derby thereto attached, which said petition, motion and affidavit are in the words and figures following, to-wit:

469 In the Supreme Court of the Territory of Hawaii.

———oOo———

William W. Bierce Ltd.
vs.
Clinton J. Hutchins, Trustee.

Petition and Motion for Rehearing and Reargument.

Now comes the plaintiff herein, by his attorneys Kinney, McClanahan & Cooper, and C. A. Galbraith, and petitions and moves this Honorable Court for a rehearing and reargument of the above cause upon the grounds that (1) the court failed to decide whether plaintiff was entitled to have any of the issues in the above cause retried, although a ruling on this point was vital to plaintiff (2) questions decisive of the case and duly submitted by counsel were overlooked by the court (3) questions decisive of the case and duly submitted by counsel did not receive due consideration from the court (4) the decision herein contains manifest error and usurps the functions of a trial court in passing on questions of fact (5) said decision is in conflict with controlling decisions of this court that findings of fact in a jury waived case are conclusive if there is any evidence beyond a scintilla to support said findings, and also similar controlling decisions in regard to the law of estoppel. Said grounds are more particularly as follows:

470 A. The court failed to decide, and it is submitted that it should decide, whether plaintiff is entitled to a new trial as regards the recovery of the non-lienable items at least in the contracts of February 21st. 1900 and March 13th. 1901, which point is left entirely indefinite and uncertain in the decision herein (See in this connection affidavit of S. H. Derby hereto attached).

B. The court failed to decide, and it is submitted that it should decide, whether the court should in the present case go into the question whether plaintiff's attempt to enforce a lien might have terminated successfully in whole or in part, and the court committed manifest error in deciding that the ground relied on by plaintiff to show that its lien suit would have been ineffectual was not one based on any proposition of law that would clearly show that said suit would have been ineffectual, as regards some of the items at least (such as the rolling stock) on which it was sought to enforce a lien and in deciding that the result of said suit, as to such items would depend in part at least upon the evidence.

C. That in deciding that the contract of March 13th. 1901 was not an entire contract, the court overlooked or failed to give due consideration to (1) the testimony of Harry T. Gilbert, who negotiated the contract in question, and especially his answer to interrogatory 14 explaining the circumstances under which said contract was made, and also the testimony of William W. Bierce to the effect that the contract was entire
(Transcript p. 32) (2) all the circumstances surrounding
471 said transaction and especially the payment of the $10,000
and the impossibility of apportioning it to the non lienable rather than the lienable items in the contracts of February 21st. 1900 and March 13th. 1901, as well as the difference in price in the said contracts (3) the very terms of the contract of March 13th. 1901 itself showing that it was *in settlement of* the prior contract and (4) to the fact that said testimony, circumstances and contract might conceivably lead a reasonable man to find that said contract was an entire contract; and hence said decision herein is in conflict with controlling decisions of this court that findings of fact in a jury waived case are conclusive if there is any evidence beyond a scintilla to support said findings.

D. That the court overlooked or failed to give due consideration to plaintiff's contention that its lien suit was based on the contract of February 21st. 1900, which had been abrogated by the contract of March 13th. 1901.

E. That the court committed manifest error, failed to give due consideration to the argument of counsel and assumed the functions of a trial court in assuming that the difference in the aggregate amounts payable under the contracts of February 21st. 1900 and March 13th. 1901 was probably due to expenses for storage and otherwise instead of considering said circumstances as supporting the conclusion that the second contract was an entire one for a lump sum consideration.

F. That the court committed manifest error and overlooked or failed to give due consideration to the argument of counsel in applying the principles of estoppel in the above cause, in that it nowhere appears that anyone was misled to his injury by plaintiff's action and in that the parties claiming the estoppel were fully cognizant of all the facts
472 or were charged with knowledge thereof, and in that said
decision in applying the principles of estoppel to this

case was in conflict with controlling decisions of this court on the law of estoppel.

G. That the court committed manifest error in deciding that the plaintiff had made an election.

This petition is based on the records in the case and on the affidavit of S. H. Derby hereto attached and made a part hereof.

Dated February 25th. 1905.

(Signed) KINNEY, MCCLANAHAN & COOPER.
" C. A. GALBRAITH
Attorneys for Plaintiff.

Rcd Copy Feby 25th 1905
Signed) J. W. CATHCART
W. L. WHITNEY
CASTLE & WITHINGTON
Attorneys for Deft.

473 IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

——oOo——

William W. Bierce Ltd
vs.
Clinton J. Hutchins, Trustee

Island of Oahu,
Territory of Hawaii } ss.

S. H. DERBY being first duly sworn on oath deposes and says:

That he is a member of the firm of Kinney, McClanahan & Cooper, attorneys for the plaintiff herein and has been familiar with the above cause in all its stages; that at the trial of the above cause before the Honorable J. T. DeBolt, First Judge of the Circuit Court of the First Circuit, it was deemed absolutely necessary to have William W. Bierce, President of the plaintiff corporation present as a witness at the trial, and that said William W. Bierce travelled from Oklahoma City, Oklahoma, to Honolulu to attend said trial, and gave material and valuable evidence in regard to the value of the property in controversy at the date the above suit was instituted; that if a new trial is had of said cause it will be necessary either to have said William W. Bierce present or at least to take his deposition; that said William W. Bierce is still 474 a resident of Oklahoma City and could ill spare the time to attend a new trial of the above cause though affiant verily believes that he would attend such trial if the same was had; that in any event said new trial would involve considerable expense to the plaintiff herein; that affiant has carefully examined the decision of this court and is unable to say from said decision whether plaintiff has any such standing in court as would make it worth while to re-try the cause in that it is impossible to tell from said decision whether or not plaintiff still has a right to sue as regards the non lienable items in the contract of March 13th, 1901; that the decision of said point will enable plaintiff to decide whether to pursue its action or not, and that said point is a point necessarily arising in the case and proper to be considered by this court.

(Signed) S. H. DERBY.

Subscribed and sworn to before me this 24th day of February A. D. 1905.

(Signed) GUSSIE H. CLARK
Notary Public First Judicial Circuit

(Endorsed): Filed February 25th, 1905, at 9:40 A. M. George Lucas, Clerk.

475 Afterwards, to-wit, on the 13th day of April, A. D. 1905, there was filed in the office of the Clerk of said Supreme Court, in said cause, the written request of said court for further argument by counsel upon the motion for a rehearing in said cause on Tuesday, the 18th day of April, 1905, which said request is in the words and figures following, to-wit:

476 IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

October Term, 1904.

——oOo——

W. W. Bierce, Ltd.,
v.
C. J. Hutchins, Trustee.

The court requests further argument by counsel upon the motion for a rehearing in the above entitled case on Tuesday, the 18th inst., on the following questions:

If the contract was one of conditional sale or an executory contract to sell upon condition precedent.

(1) Was it entire?

(2) Could the lien suit have been maintained?

(3) How far ought the court to go into the question whether the lien suit could have been maintained?

(4) If the lien suit could not have been maintained, did it show an election of rights?

(5) Did the plaintiff have a right to elect between an absolute sale and a conditional sale or executory contract to sell?

(6) If the defendant had pleaded the lien suit, would the plea have been bad on demurrer?

(Signed) GEORGE LUCAS,
Clerk.

Honolulu, April 13, 1905.

477 Thereupon, to-wit, on the 13th day of March, 1905, in the October Term of said Supreme Court of the year 1904, in the record of the proceedings thereof in said cause, appears the following entry, to-wit:

478 SUPREME COURT OF THE TERRITORY OF HAWAII

October Term, 1904

W. W. Bierce Ltd
v.
C. J. Hutchins Trustee } Honolulu, Monday March 13th 1905

CLERK'S MINUTES.

Motion for Rehearing

Before Frear C. J. Hartwell and Wilder, J. J.

Kinney McClanahan & Cooper; S. H. Derby and C. A. Galbraith appeared for the Plaintiff and J. W. Cathcart and Castle & Withington for Defendant

Mr. Derby reads motion for rehearing also affidavit of S. H. Derby.

Mr. Galbraith Argues

Mr Derby Argues

Mr Cathcart Argues

The Court takes the matter under consideration

479 Afterwards, to-wit, on the 29th day of April, A. D. 1905, in the October Term of said Supreme Court of the year 1904, there was filed in the Clerk's office of said Supreme Court, in said entitled cause, the opinion of said Supreme Court by Mr. Chief Justice Frear and the concurring opinion of Mr. Justice Hartwell, which said opinion and concurring opinion are in the words and figures following, to-wit:

480 IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

October Term, 1904.

———oOo———

W. W. Bierce, Ltd.,
v.
C. J. Hutchins, Trustee.

Petition for Rehearing.

Argued March 13 and April 18, 1905. Decided April 29, 1905.

Frear, C. J., Hartwell and Wilder, JJ.

Election—its nature and effect.

Election is a choice between inconsistent remedial rights. It may be manifested by the institution of an action to enforce one of the rights, whether the action is carried to completion or not and whether, if it should be carried to completion, it would be successful or not. It is of rights rather than of remedies, the attempt to enforce a particular remedy being the manifestation of the choice of one of the rights. But there cannot be an election unless there are two or more rights to elect between, and so the bringing of an action to enforce a supposed but nonexisting right does not preclude the bringing of an action to enforce an inconsistent existing right. Likewise, even if there are two or more inconsistent rights and an action is brought to enforce one, there is no election, if such action is brought in ignorance of the facts; but if the action is brought with knowledge of the facts, there is an election, even though there
481 is no actual intent to abandon the other inconsistent right or rights. Other actions may be brought to enforce the same or other consistent rights but not to enforce other

inconsistent rights. And, of course, there is no election when inconsistent rights are proceeded on at the same time. An election once made is irrevocable. It differs from the various classes of estoppel proper and rests on the principle that one cannot occupy inconsistent positions.

Id.—of right to proceed on theory of absolute sale by bringing lien suit, precludes proceeding on theory of conditional sale by replevin.

In the case of a conditional sale, the vendor may waive the condition and treat the sale as absolute, as, by instituting a materialman's lien suit based on the theory that the title has passed to the vendee, but if he so elects with knowledge of the facts he cannot afterwards treat the sale as conditional, as, by bringing replevin based on the theory that the property is still in him. Such is the result, even though the lien suit could not have been carried to judgment with success, for in such case the election is between the existing inconsistent rights to proceed on the theory that the title has passed and to proceed on the theory that it has not passed; it is not merely between a supposed but nonexisting remedy by lien suit and an existing remedy by replevin.

Id.—cannot be made to treat sale conditional in part
482 and absolute in part.

The bringing of the lien suit bars the action of replevin even though only a portion of the items covered by the contract and for which the lien suit was brought are lienable.

483 OPINION OF THE COURT BY FREAR, C. J.

This is a petition for a rehearing of the case decided ante, page 418. The action is for replevin for rails, cars, etc., claimed to have been sold by the plaintiff on the condition that title should remain in it until payment. The court held that even if title were to remain in the plaintiff until payment still the plaintiff could not maintain replevin, which is based on the theory that the title was in it, for the reason that it had previously elected an inconsistent right by bringing an action for the price and to enforce a materialman's lien, which was based on the theory that the title had passed to the vendee.

For the purposes of the original decision it was assumed that the contract was one of conditional sale or, perhaps more accurately speaking, that it was an executory contract to sell upon condition precedent. We will proceed upon that assumption for the purposes of the present decision also, although it may not be out of place to state that in the opinion of a majority of the court the sale was absolute and therefore replevin could not be maintained in any event.

The petition sets forth seven grounds, all of which were either considered by the court or not raised by counsel at the original hearing. They may be summed up as follows: (1) That the court should have decided, but did not do so, whether the plaintiff is entitled to a new trial as regards the items which, by reason of not having become attached to the realty, were not subject to a materialman's lien, and (2) that the court overlooked or did not give due consideration to certain points bearing upon the question whether the institution of the materialman's lien suit amounted to an
484 election.

As to the first of these grounds, the court merely reversed the judgment of the trial court and remanded the case for such further proceedings as might be proper, not knowing whether the plaintiff would be able to introduce further evidence bearing on the question of election which would make it worth while to have a new trial. Apparently the plaintiff knows of no other evidence that it can introduce upon that question but now asks the court to decide whether the election manifested by the institution of the lien suit extended to all the items convered by the contract or only to the lienable items. It was unnecessary to pass upon this as a primary question in the original opinion but it was passed upon incidentally by inference from the reasoning in that opinion. It goes without saying that the plaintiff could not elect to treat the sale as absolute as to part of the property covered and conditional as to the remainder. The lien suit was in fact instituted as to all the items.

As to the second ground, it will be unnecessary to discuss in detail all the points raised by counsel, for to do that would mean largely a repetition of what was said with more or less fulness in the former opinion upon the doctrine of election and its application to the facts of this case. It will be sufficient to refer to a single point in regard to which counsel for the plaintiff seems not fully to understand the former opinion. As shown in that opinion the election is not so much between remedies as between rights. The election

in this case was between the right of the plaintiff to proceed upon the theory that the sale was conditional and that the
title remained in it until payment, and the right to pro-
485 ceed on the theory that the sale was absolute and that
the title had passed to the vendee, the plaintiff having a choice between such rights if the contract was one of conditional sale. The election was between the right to the property on the theory of conditional sale and the right to the purchase price on the theory of absolute sale. It was not, as contended by the plaintiff, between a remedy by lien suit and a remedy by replevin. An election is an unequivically manifested choice between two or more inconsistent rights. The pursuit of a particular remedy is the manifestation of the choice between the rights. If two rights exist the choice may be manifested by the institution of an action, whether the action is or could be carried to completion with success or not. If the action is discontinued or fails of success the plaintiff may pursue other consistent remedies that is other remedies based on the same or a consistent right, but not other inconsistent remedies, that is, remedies based on an inconsistent right. If there is in fact only one right the institution of any number of actions on supposed but nonexisting other inconsistent rights will not amount to an election or prevent the institution afterwards of an action upon the only right that does exist. Likewise, if there are in fact two inconsistent rights and an action is brought on one under a mistake of fact and discontinued upon obtaining knowledge of the facts, there will be no election and the other inconsistent right may afterwards be proceeded upon, provided there are no elements of an estoppel in pais, as, for instance, prejudice to the other side. In the present case the plaintiff might have elected to rely on the right of property in itself under a conditional sale by bringing any one of several ac-
tions, as, for instance, replevin, trespass, detinue, etc., or
486 it might have manifested its election to proceed on the
theory of an absolute sale and property in the vendee by bringing a lien suit or an action of assumpsit accompanied by attachment, etc., or it might have brought an action which would be consistent with either right and not amount to an election, as, for instance, a simple action of assumpsit for the purchase price. Under some circumstances a mere action of assumpsit would show an election, but not in this case because of the special provisions of the contract. See former opinion and cases there cited. Also Typograph Co. v.

Macgurn, 119 Mich. 533. These principles are set forth more fully in the former opinion and cases there cited, and also in 15 Cyc. 251 et seq., and numerous recent cases there cited, which volume has been received since the former decision was rendered. The following quotations are from this volume:

"An election of remedies is the choice by a party to an action of one of two or more coexisting remedial *rights*. . . . All actions which proceed upon the *theory that the title to property remains in plaintiff* are naturally *inconsistent with* those which proceed upon the *theory that title has passed to defendant*. But there is no inconsistency between different legal remedial *rights* all of which are based upon claim of title to property in plaintiff or all of which are based upon the affirmance of title in defendant. . . . The prosecution of one remedial *right* to judgment or decree, whether the judgment or decree is for *or against plaintiff*, is a decisive act which constitutes a conclusive election, barring the subsequent prosecution of inconsistent remedial *rights*. . . . By preponderance of authority the *mere commencement of any proceeding to enforce one remedial right*, in a court having jurisdiction to entertain the same, is such a decisive
487 act as constitutes a conclusive election, barring the subsequent prosecution of inconsistent remedial *rights*. . . . In order to constitute a binding election the party must at the time the election is alleged to have been made have knowledge of the facts from which the coexisting, inconsistent remedial rights arise. . . . A person who prosecutes an action or suit based upon a remedial *right* which he erroneously supposes he has, and is defeated because of the error, has not made a conclusive election, and is not precluded from prosecuting an action or suit based upon an inconsistent remedial *right*. . . . An election once made, with knowledge of the facts, between coexisting remedial *rights* which are inconsistent is irrevocable and conclusive, irrespective of intent (Clausen V. Head, 110 Wis. 405), and constitutes an absolute bar to any action, suit, or proceeding based upon a remedial *right* inconsistent with that asserted by the election." The italics are ours.

The plaintiff contends that the election was merely between the remedy by replevin and the remedy by lien suit and that since, as it contends, the lien suit would have been ineffectual, there could not have been an election because there were not two remedies to elect between. But, as shown above, the ques-

tion is whether there were two or more inconsistent remedial rights, not as to whether, if there were two such rights, a particular proceeding adopted by the plaintiff to enforce one of them would have been successful. Even if the lien suit had been carried to completion and had failed of success there might still have been an election. See above quotation; also Renne v. Townsend, 100 N. W. (Ia.) 48; also Hickman v.
Richburg, 122 Ala. 638, cited in the former opinion, hold-
488 ing that the bringing of a materialman's lien suit, even
though it must necessarily have been ineffectual,
amounted to an election and an abandonment of the title reserved on the sale.

It is true that there is more or less confusion in the books in the use of the words "remedies" and "rights" in connection with the doctrine of election, but in general it will be found upon an examination of the cases that where it is held that no election has been made, either there was in fact no right, although one was supposed to exist, for the enforcement of which the action claimed to manifest an election was instituted, or if there was such a right the action was instituted under a mistake of fact, or proceedings were brought on two or more inconsistent rights at the same time, in which case, of course, there was no election. Still most of the cases speak of rights or causes of action as distinguished from mere forms of action. For instance, in Snow v. Alley, 156 Mass. 193, upon which the plaintiff relies, the court, by Mr. Justice Holmes, said:

"Election exists when a party has two alternative and inconsistent rights, and it is determined by a manifestation of choice. . . . But the fact that a party wrongly supposes that he has two such rights and attempts to choose the the one to which he is not entitled, is not enough to prevent his exercising the other, if he is entitled to that."

In Butler v. Hildreth, 5 Met. 49, cited in Snow v. Alley, the court said, by Chief Justice Shaw:

"The assignee has an election, not of remedies merely, but of rights. But an assertion of one is necessarily a renunciation of the other. This results from the plain and very
obvious consideration, that the assignee cannot affirm
489 the sale in part and disaffirm it in part; if it is to stand
as a valid sale the property of the goods remains vested
in the purchaser and he remains liable for the price. But if the sale is avoided and set aside, it stands as if it had

never been made. . . . What action on the part of the assignee is to be taken as proof of his election? . . . We think that if the assignee commences an action against the purchaser for the price, and causes his property to be attached to secure it, this is a significant act, an unequivocal assertion that he does not impeach the sale but by necessary implication affirms it."

It thus seems that there may be an election not only when the action instituted has not been carried to completion but also when it has been carried to completion unsuccessfully. It is unnecessary, as intimated in the former opinion, to say definitely whether the lien suit could have been carried to completion successfully or not, and in Johnson-Brickman Co. v. Mo. Pac. R. Co. 126 Mo. 344, cited by the plaintiff, it was held that where the action was not carried to completion neither the trial court nor the appellate court could determine whether it could have been carried to completion with success,—although the court gave this as one of the reasons why it should hold, as it did, that the commencement of an action accompanied by an attachment, if not carried to judgment, would not amount to an election so as to prevent a subsequent action of replevin, which ruling it must be conceded is contrary to the views expressed in our former opinion, but which also in our opinion is contrary to the great weight of authority and to cases referred to by that court and is based upon a confusion as to rights and redemies and upon the idea that
to constitute an election there must exist facts amount-
490 ing to an estoppel in pais. Election differs from the va-
rious classes of estoppel and rests on the principal that
one cannot occupy inconsistent positions. Whether the conclusion reached by that court was nevertheless correct on the ground that the first suit was brought under a mistake of fact no opinion need be expressed.

The petition for a rehearing is denied.

Kinney, McClanahan & Cooper; S. H. Derby and
C. A. Galbraith
for plaintiff.

J. W. Cathcart and
Castle & Withington
for defendant.

(Signed) W. F. Frear
A. A. Wilder

491 CONCURRING OPINION OF HARTWELL, J.

The decision in this case was based upon the theory of a conditional sale, although the court did not say that they regarded the transaction as of that nature. It is only on the theory that the sale was conditional that the question of election can arise.

The facts are as follows: February 12, 1900, the plaintiff agreed to "furnish" to the Kona Sugar Co. and the company agreed to accept in Honolulu certain railway material and equipment at stated prices to be delivered at stated times upon payment of drafts accompanying bills of lading. This agreement was not executed, as the drafts were not paid and the property remained for many months in the plaintiff's possession in Honolulu.

March 13, 1901, the plaintiff agreed with the company that upon payment on the following day of $10,000 with the company's promissory note for $37,044.53 payable in six months with interest at 7-1/2 per cent., secured by its first mortgage bonds of that amount it would deliver to the company "the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials (now awaiting delivery, upon the express condition and understanding that said rails, locomotives, cars, scales and other materials) are and shall remain the property of William W. Bierce, Limited, until the full payment of the note above described, according to its terms." This was done and the plaintiff "released the bills of lading from the drafts," the railroad equipment "was removed from Honolulu to Kona and the railroad of the Kona Sugar Co. was constructed."

The note was not paid September 14, 1901, when due or
492 afterwards. February 17, 1902, a receiver of the company was appointed who took possession of its property and carried on the business of its plantation, the company "continually getting deeper into debt and becoming more and more hopelessly insolvent." May 12, 1902, the plaintiff filed in the circuit court a notice of its lien on the railroad equipment and August 1, 1902, nearly a year after the note was defaulted, brought suit against the company and its receiver to enforce the lien, which in January, 1903, it discontinued, and afterwards brought this action of replevin.

By the second agreement the property remained the plaintiff's subject to payment of the note at maturity, upon the happening of which event the company would have become its owner. Upon non-payment of the note the plaintiff had the undoubted right to claim the property as its own and the equally undoubted right, notwithstanding the non-payment, to hold the company as a purchaser, in the latter case treating the agreement as executed instead of executory, but the two rights being directly inconsistent with each other, both of them could not be exercised either concurrently or successively.

The civilians would have applied to this case the maxim "Allegans contraria non est audiendus," meaning that a man shall not be permitted to "blow hot and cold." If when the plaintiff brought this lien suit it knew that the bonds it held as collateral security for the unpaid purchase money were absolutely of no value, as afterwards was shown, then as a matter of common business sense it would have claimed the property as its own and as not sold to the company, and would not have claimed that it was sold as was necessary
493 to do in bringing a lien suit. It is to be inferred therefore that the plaintiff then considered that it was for its interest to treat the company as a purchaser in order to get some benefit from the bonds. There was no other possible reason for a lien suit, for if successful it could only have secured to the plaintiff a judgment which would be a preferred claim on the company's plantation; whereas by claiming that the property was unsold it was the property and nothing else which was obtained. Later on, when no other change had occurred in conditions than resulted from the evident worthlessness of the bonds, the plaintiff discontinued its lien suit and claimed then for the first time that under the agreement the property had not been sold. The reason of the rule expressed in the maxim above cited is that when a right may be acquired by asserting it and by such assertion is acquired, the assertion cannot be withdrawn in order to establish an inconsistent right. The lien suit was a formal avowal made in court of the plaintiff's election to treat the transaction as a sale, and it was in no other way than by such avowal or its equivalent that the transaction could have become a sale. On principle it might seem that if the plaintiff simply sent to the Kona Sugar Co. a letter stating that it would hold it liable as a purchaser, this would have been an unequivocal exercise of its right to regard the property as sold, and would suffice to vest in the plaintiff the rights of a seller, and in the company the right as well as the liability of a buyer, which

rights the plaintiff could not afterwards change to suit its convenience. The cases, however, do not appear to go to that extent, although Woodley v. Coventry, 2 H. & C. 164,
very nearly does so. In that case the defendants had
494 sold 350 barrels of flour, to be taken from a larger
quantity, to one Clarke who obtained advances of the plaintiff on the security of the flour and gave the plaintiff a delivery order on the defendants. The plaintiff sent the order to the defendants' warehouse and left it there, the clerk saying "It is all right." The plaintiff sold the flour to different persons and the defendants delivered part, but Clarke becoming bankrupt, refused as unpaid vendors to deliver any more. The plaintiff brought trover and it was contended for the defendants that by their contract with Clarke no property had passed, because the sale was not of any specific flour. The court held that the defendants were estopped from denying that the property had passed.

If a vendor proposes to reclaim property on the ground that it is forfeited to him for non-payment of purchase money his claim should be made clearly and seasonably, and any act of his from which the buyer might properly infer that he did not claim the forfeiture would be an act beyond his recall. Nonperformance of the condition subsequent would not per se work a forfeiture, but only upon the vendor's assertion that he claimed it. The condition once waived cannot be revived. But in the case of an executory agreement to sell, the property to pass to the buyer only upon his performance of a condition precedent, namely, upon payment, non-payment does not per se work a forfeiture of any right acquired by the intending buyer, for his only right is to acquire the property upon paying for it.

But in the one case as in the other, unequivocal words or conduct of the seller showing that he does not treat the property as forfeited or as unsold, and does treat it as sold,
would preclude him from afterwards setting up the in-
495 consistent claim that he owned the property and had
not sold it. The plaintiff having exercised its option of affirming the transaction as a sale cannot disaffirm its own act.

I concur in the opinion of the court that the case ought not to be reheard.

(Signed) ALFRED S. HARTWELL.

(Endorsed): Decision, filed April 29th, 1905. George Lucas, Clerk.

496 Afterwards, to-wit, on the first day of May, 1905, in the October Term of said Supreme Court of the year 1904, came the plaintiff in said entitled cause, by its attorneys, and filed in the Clerk's office of said Supreme Court a motion, notice of motion and form of judgment, which are in the words and figures following, to-wit:

497 IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

William W. Bierce Limited,
vs. } Replevin.
Clinton J. Hutchins, Trustee

Motion for Judgment.

Now comes the plaintiff herein, by its attorneys, Kinney, McClanahan & Cooper and C. A. Galbraith, and moves this Honorable Court that a final judgment be entered in this court for the defendant, a form of which judgment is hereto attached.

This motion is based on the record and is made in order that there may be a final judgment in the above cause which may be reviewed by a writ of error to the Supreme Court of the United States.

WILLIAM W. BIERCE LIMITED,
By KINNEY, MCCLANAHAN & COOPER
C. A. GALBRAITH (per S. H. D.)
Its attorneys

NOTICE OF MOTION

To Messrs J. W. Cathcart and Castle & Withington, attorneys for the defendant herein.

Please take notice that we shall present the foregoing motion to the Honorable Supreme Court of the Territory of Hawaii on Tuesday the 2nd day of May 1905 at 10
498 o'clock or as soon thereafter as counsel may be heard and ask that the same be allowed.

KINNEY, MCCLANAHAN & COOPER
C. A. GALBRAITH (per S. H. D.)

499 IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

October Term, 1904.

William W. Bierce, Limited, *Plaintiff.* *vs.* Clinton J. Hutchins, Trustee, *Defendant.*	Replevin.

Judgment.

Now on this 2nd day of May, 1905, same being one of the regular court days of the October, 1904 term of said court, the above cause coming on for further consideration on the plaintiff's motion for the entry of judgment herein, the same being argued by counsel and duly considered by the court, is granted:

Whereupon it is considered by the court and is now ordered and adjudged that the judgment rendered in said cause by the circuit court for the First Judicial Circuit, Territory of Hawaii, in favor of the plaintiff for the return of the property in controversy or in case the same should not be returned for the value thereof found to be the sum of Twenty Two Thousand Dollars and interest thereon, be and the same is hereby reversed and the exceptions thereto taken by the defendant, as set out in his bill of exceptions, in so far as they raise the question of election, are sustained and said
500 cause is hereby remanded to the said circuit court with direction to dismiss the plaintiff's petition with costs.

By the Court,

....

Clerk of the Supreme Court, Territory of Hawaii.

Endorsed: Filed, May 1st, 1905. George Lucas Clerk.

501 Afterwards, to-wit, on the 6th day of May, 1905, in the October Term of said Supreme Court of the year 1904, came the plaintiff in said entitled cause, by its attorneys, and filed in the Clerk's office of said Supreme Court a motion, notice of motion and affidavit, which are in the words and figures following, to-wit:

502 IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

October Term, 1904.

William W. Bierce, Limited
v.
Clinton J. Hutchins, Trustee, } Replevin.

Motion.

To the Honorable Supreme Court of the Territory of Hawaii:

Now comes the plaintiff herein, by its attorneys, Kinney, McClanahan & Cooper and C. A. Galbraith, and moves this Honorable Court that an order be entered in the above cause modifying the decision herein made and filed on January 28, 1905, whereby "the exceptions, so far as they raise the question of election, are sustained, the judgment of the trial court is reversed and the case is remanded to that court for such further proceedings as may be proper," so as to direct that the case be remanded to the Circuit Court with instructions to enter judgment for the defendant with costs.

This motion is based on the record, and on the affidavit of S. H. Derby hereto attached and made a part hereof, and is made in order that plaintiff may have a final judgment entered in the above cause which may be reviewed by a writ
503 of error to the Supreme Court of the United States.

Dated, May 5th, 1905.

WILLIAM W. BIERCE LIMITED,
By KINNEY, MCCLANAHAN & COOPER.
C. A. GALBRAITH (per S. H. D.)
Its attorneys.

NOTICE OF MOTION.

To Messrs. J. W. Cathcart and Castle & Withington, attorneys for the defendant herein.

Please take notice that we shall present the foregoing motion to the Honorable Supreme Court of the Territory of Hawaii, on Saturday the 6th day of May, 1905, at 10 o'clock a. m. or as soon thereafter as counsel may be heard and ask that the same be allowed.

KINNEY MCCLANAHAN & COOPER.
C. A. GALBRAITH (per S. H. D.)
Attorneys for plaintiff.

504 IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

October Term, 1904.

William W. Bierce, Limited,
v.
Clinton J. Hutchins, Trustee, } Replevin.

AFFIDAVIT OF S. H. DERBY.

Island of Oahu,
Territory of Hawaii. } ss.

S. H. Derby, being first duly sworn on oath deposes and says:

That he is a member of the firm of Kinney, McClanahan & Cooper, attorneys for the plaintiff herein; that he is also the attorney in fact for William W. Bierce Limited, the plaintiff herein; that the plaintiff at the trial of the above cause put on its whole case, and that it will have no further evidence to present at a second trial of said cause in case the same is remanded by this court for further proceedings.

And further affiant sayeth not.

(Signed) S. H. DERBY.

Subscribed and sworn to before me this 5th day of May A. D. 1905.

(Signed) GUSSIE H. CLARK
Notary Public First Judicial Circuit.

(Endorsed): Filed, May 6th, 1905. George Lucas Clerk.

505 Thereupon, to-wit, on the 6th day of May, 1905, in the October Term of said Supreme Court of the year 1904, in the record of the proceedings thereof in said entitled cause, appear the following entries, to-wit:

506 IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

October Term, 1904.

William W. Bierce, Limited,
v.
Clinton J. Hutchins, Trustee. } Replevin.

ORDER MODIFYING DECISION.

Upon the plaintiff's motion herein filed, supported by affidavit setting forth that it will have no further evidence to present at a second trial of said cause, it is hereby ordered that the decision herein made and filed on January 28, 1905, whereby "the exceptions, so far as they raise the question of election, are sustained, the judgment of the trial court is reversed and the case is remanded to that court for such further proceedings as may be proper," is hereby modified by directing that the case be remanded to the circuit court with instruction to enter judgment for the defendant with costs.

Honolulu, May 6, 1905

By the Court
(Signed) GEORGE LUCAS
Clerk of the Supreme Court of the Territory of Hawaii.

(Endorsed): Decision, filed May 6, 1905. George Lucas, Clerk.

(On the back of p. 506 the following is written) Supreme Court Territory of Hawaii Wm. W. Bierce Ltd. vs. Clinton J. Hutchins Order Modifying Decision Filed May 6. 1905 George Lucas Clerk

507 In the Supreme Court of the Territory of Hawaii.

October Term, 1904.

——oOo——

William W. Bierce, Limited,
v.
Clinton J. Hutchins, Trustee.
} Replevin.

JUDGMENT.

Now on this 6th day of May 1905, the same being one of the regular court days of the October Term of said Court, the above cause coming on for further consideration on the plaintiff's motion for a modification of the original decision herein made and filed on January 28, 1905, so as to direct that the above cause be remanded to the Circuit Court of the First Circuit with directions to enter judgment for the defendant with costs, and said motion having been granted, and said order having been entered on this date.

Now Therefore it is considered by the Court and is now ordered and adjudged that the judgment rendered in said cause by the Circuit Court of the First Judicial Circuit, Territory of Hawaii, in favor of the plaintiff for the return of the property in controversy in the above cause, or in case the same should not be returned, for the value thereof, found to be the sum of $22,000.00 and interest thereon, be and the same is hereby reversed, and the exceptions, in so far as 508 they raise the question of election, are sustained, and the said cause is hereby remanded to the said Circuit Court with directions to enter judgment for the defendant with costs.

Entered this 6th day of May, A. D. 1905.

By the Court.
(Signed) George Lucas,
Clerk of the Supreme Court of the Territory of Hawaii.

(Endorsed): Judgment, filed May 6, 1905. George Lucas, Clerk.

(On the back of page 508 the following is written) Supreme Court Territory of Hawaii Wm. W. Bierce Ltd vs Clinton J. Hutchins Judgment Filed May 6. 1905 George Lucas Clerk

509 SUPREME COURT OF THE TERRITORY OF HAWAII

October Term, 1904

W. W. Bierce Ltd
v.
C. J. Hutchins Trustee

Honolulu, Saturday May 6th 1905

CLERK'S MINUTES.

Motion for an order modifying the decision in the above entitled cause filed January 28, 1905.
Before Frear C. J. Hartwell & Wilder J. J.

Kinney McClanahan & Cooper and S. H. Derby and C. A. Galbraith appeared for the Plaintiff

Mr Derby reads the motion also affidavit of S. H. Derby

J. W. Cathcart and Castle & Withington counsel for Defendant being present in court, declines to say anything in regard to the Motion.

510 Mr Derby states that the former notice and motion for Judgment, filed May 1, 1905 is discontinued

The Court grants the motion modifying the former decision by directing that the case be remanded to the Circuit Court with instructions to enter Judgment for the defendant with costs.

GEORGE LUCAS
Clerk

511 Afterwards, to-wit, on the 11th day of May, 1905, in the October Term of said Supreme Court of the year 1904, came the plaintiff in said entitled cause, by its attorneys, and filed in the Clerk's office of said Supreme Court its petition and motion for findings of fact, notice and statement of facts, which are in the words and figures following, to-wit:

512 IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

October Term 1904.

William W. Bierce, Limited,
Plaintiff.
vs. } Replevin.
Clinton J. Hutchins, Trustee,
Defendant.

PETITION AND MOTION FOR FINDINGS OF FACT.

To the Honorable, the Supreme Court of the Territory of Hawaii.

Comes now your petitioner, William W. Bierce, Limited, and respectfully shows to this Honorable Court, that the matter and amount involved in the above entitled suit exceeds, exclusive of interest and costs, the sum or value of five thousand dollars.

That your petitioner feels aggrieved at the decision and judgment given in said cause, and is desirous of appealing the same to the United States Supreme Court, and that in order to give said Court jurisdiction to pass upon the merits of said suit, it seems to be necessary that this court should "make a statement of the facts of the case in the nature of a special verdict", as provided by Act. 80, 18 U. S. St. at L. pp. 27 & 28.

That your petitioner presents herewith a statement of the facts as it conceives them to be established by the evidence in said cause.

513 And your petitioner prays this Honorable Court to make a statement of the facts relied on by it to support said judgment as required by the Statute aforesaid, either by adopting and approving the statement of facts presented herewith, or by making such other statement of facts as to it may seem just and proper: and your petitioner will ever pray.

KINNEY, MCCLANAHAN & COOPER
C. A. GALBRAITH
Attorneys for Petitioner.

Honolulu, May 11th, 1905.

514 IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

October Term, 1904.

William W. Bierce, Limited,
Plaintiff.
vs.
Clinton J. Hutchins, Trustee,
Defendant.
} Notice.

To Messrs. Castle & Withington and John W. Cathcart, Attorneys for the Defendant.

Sirs:

You will please take notice that the foregoing motion and accompanying statement of facts will be presented to the Supreme Court of the Territory of Hawaii for allowance, at its court room in the Judiciary Building at Honolulu, on Tuesday the 16th. day of May, at 9 o'clock A. M. or as soon thereafter as Counsel can be heard.

Dated Honolulu, May 11th, 1905.

KINNEY, MCCLANAHAN & COOPER
C. A. GALBRAITH
Attorneys for Plaintiff.

We hereby accept service of the above motion and acknowledge receipt of copy of the motion and accompanying statement of facts.

J. W. CATHCART
CASTLE & WITHINGTON
Attorneys for Defendant.

Dated Honolulu, May 11th, 1905.

515 IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

William W. Bierce, Ltd.,
Plaintiff.
vs.
Clinton J. Hutchins, Trustee,
Defendant.
} Replevin.

STATEMENT OF FACTS.

This was an action of replevin instituted by the plaintiff, a Louisiana corporation for the recovery of certain railway material consisting of rails, cars, locomotives etc. The defendant is the purchaser of the property of the Kona Sugar Company Ltd., an Hawaiian corporation, at a Receiver's sale. The material facts in the case are as follows:

On February 21st. 1900 plaintiff and the Kona Sugar Co. Ltd. entered into the following executory contract of sale.

Honolulu, Hawaiian Island, Feby 1st, 1900

Kona Sugar Company,
Hawaiian Islands.

Gentlemen:—

For the sum of Forty Six ($46.40) Dollars and forty cents per ton of 2,240 pounds, we propose to furnish you with five hundred and fifty (550) Tons of first quality Steel "T" Rails, weighing 35 lbs. to the yard. Also, to furnish sufficient 516 complete joints to lay said Rails for the sum total of Two Thousand Two Hundred and Eighty One ($2,281.00) Dollars one complete joint being furnished for each Rail; a complete joint consisting of two Angle Bars and four bolts. Also, for the sum of One Thousand Four hundred and Forty ($1,400.00) Dollars to furnish sufficient 4-½"x½" Railroad Track Spikes to lay the 550 Tons of Rails with cross ties 2' between centers.

The above prices are all freight prepaid to Honolulu, the Kona Sugar Company to reimburse Bierce for the insurance to be paid therein.

We are also to furnish for the sum of Five Hundred and Forty Five ($545.00) Dollars, c. i. f. prepaid to Honolulu, ten sets of 35 lb. 6" Split Switch points, tie rods and slide plates; all designed for 3' gauge of track.

Further to furnish sixteen (16) cars, 28' long, 7' wide, end stakes 5' high floor line, for 3' gauge of track; as per the following specifications; price to be three hundred and forty ($340.00) Dollars per car c. i. f. prepaid to Honolulu.

Lumber.

6 Longitudinal Sills, 4"x8" Pine.
2 End Sills, 6"x10" Oak; (planking 2").
2 Sub End Sills, 5-½"x6" Oak.
4 Draft Timbers, 2-½"x5-½", Oak.
2 Cross Ties, 3"x5" Oak.
6 End Stakes, 4"x5" Oak, 5' above floor line of car
Filler blocks of oak/

Construction.

Sills will be mortised and tenoned to fit. Draft timbers will be bolted to both center sills, end sills and sub end sills and be protected by cast iron mortise blocks. Cross ties will support car in center in conjunction with truss rods. End stakes will be mortised into end sills, and braced with angle or T iron for 3′ of their length. All wood to be coated with mineral paint; all iron work with asphaltum.

No floor planks, or side stakes shall be furnished.

Trucks.

517 Two Standard Trucks of the diamond typo, provided each with four wheels, chilled charcoal iron 24″in diameter, 3-½″ tread 275 lbs. each, mounted on axles 3-¾″ diameter; Journals 3-½″ diameter and having solid brass journal bearings. The top arch bar shall be 3″x⅝″, bent to shape and drilled ¾″ column and journal box bolts. Journal boxes of cast iron provided with spring lid and hinged at the top. Bolster springs are to be in nests of four each, provided with plates top and bottom and of such sizes and dimensions to suit capacity of cars. Truck bolsters shall be 1 Beams and Channels—there shall be no wood work of any kind in the truck proper. Body bolster shall be of steel.

Stake Pockets.

Side Stake pockets, 24 in number (12 on each side of the car) of malleable iron for 3-½″x3-½″ stake at top, and diminishing to 3″x3″ at bottom. They shall be fastened to outside sill with ⅝″ U bolt, said U bolt passing through filler block to intermediate sills and fastened with nut on cast iron washer.

Ends.

The end stakes shall be tenoned into end sills and braced in front with T or angle iron for 3″ of the stake, and further braced with malleable iron bracket at end of car. Shall be bored for ½″ bolts to hold planking in position. Shall be held in position at bottom each by two ⅝″ eye bolts, passing through bottom of stake and sill and fastened to intermediate sills.

Draw Gear.

Draw gear consists of Cast Iron drawheads, wrought iron follower plates, guides, etc., with draw springs and cast iron draw bar stops. Draw timbers are secured to center sills each with two ⅝" bolts, provided with cup washers on top and double nuts and wrought iron washers on bottom. Are further secured to buffer blocks (sub end sills) with four ⅝" bolts. Drawbar carrier is made of 2-¼"x⅜", with ends gibbed to prevent draw timbers from spreading. Buffer block, or sub end sill is faced with plate of 4"x⅝" iron.

Brake.

Car equipped with hand brake on each truck each with end wheel working on, end sill.

518 General.

Lumber entering into the manufacture of this car to be of good merchantable quality. Cars are to be shipped knocked down. All work to be done in a thorough and workmanlike manner Car Guaranteed For Fifteen (15) Tons Carrying Capacity.

The locomotives to be furnished are as follows:

One 9"x14", Class "A", Saddle Tank locomotive of the Dickson Locomotive Works make, as per photograph attached, signed by both parties hereto for identification. Price of this locomotive to be Three Thousand Seven Hundred and Fifty Five ($3,755.00) Dollars, c. i. f. prepaid to Honolulu. This locomotive to be for 36" gauge, marked "Kona Sugar Company," "No. 1", and to be fitted with steam brake.

also

One 10"x16", Class "M", back truck Saddle Tank Locomotive with six driving wheels, to be manufactured by the Dickson Locomotive Works, for 36" gauge to be fitted with steam brake and a duplicate in construction of the "Halawa", photo signed by both parties and attached hereto for identification. The approximate weight of this locomotive ready for service will be 38,000 pounds, 31,500 lbs. of which will be carried on the driving wheels. The driving wheels of this locomotive will be 33" diameter, whilst those under the trucks will be

18″ diameter The boiler pressure will be 150 lbs., water capacity 500 gallons piston rod of machine steel, to have two sand boxes one forward and one back of the driving wheels; to be furnished with baloon shaped stack with spiral cone provided with steel wire netting. Cross head pump to be on right side and injector on left side. Fire box of steel. Price of this locomotive to be five Thousand Four Hundred and Ninety Five ($5,495.00) Dollars c. i. f. prepaid to Honolulu. Locomotive to be marked "Kona Sugar Company", "No. 2".

These locomotives will each have two headlights, be constructed for use of either wood or coal as fuel; sold and guaranteed to be of best material, workmanship and design, and equal in every degree to locomotive of same size and type built and manufactured by the Baldwin Locomotive Works.

Lastly, there is to be furnished one "Howe" Narrow Gauge Track Scale, to have a capacity of 25 Tons, platform 30′ in length--foundation plan to be furnished by us—timber, work and foundation to be furnished by the Kona Sugar Company price $500.00 c. i. f. prepaid to Honolulu.

519 Deliveries.

Shipment of one-third of the Rails, joints therefor, all the spikes, all the switches, four cars, the 9″x14″ Locomotive and the scales from works in four months after acceptance of this proposition; another one-third of the rails, together with the joints therefor, in five months after acceptance of this proposition; the balance of the Rails and Joints in six months after acceptance of this proposition; the balance of the cars (12) and the 10″x16″ locomotive may be shipped at any time to insure delivery at Honolulu December 1st, to 15th after signing of contract.

Terms of Payment.

Cash upon presentation of demand draft attached to bill of lading, issued by initial line of railroad, showing material to have been shipped through to Honolulu. Insurance policy shall be transmitted as soon as possible after shipment is made, when it shall be determined just what vessel shall haul the material from port on mainland to Honolulu.

All monies are payable in New York or Chicago funds; the Kona Sugar Company to pay all items of exchange.

Twenty five hundred ($2,500.00 to be covered by 5% deductions from the materials as shipped. Bierce agrees to deposit this $2,500.00 stock of the Kona Sugar Company with the Banking House of Bishop & Company in the City of Honolulu, as guarantee for the final consummation of the contract.

Note where reference herein is made to Honolulu as point of delivery—if vessels are available about time material is ready to ship sellers will make delivery at Kailua, District of Kona, in the Hawaiian Islands; but this is not to be construed as in any manner obligatory or binding.

This proposition is a confirmation of the verbal one made the Directors of the Kona Sugar Company at their meeting, Saturday, February 17th, 1900, and becomes binding on all parties when accepted by their agents, M. W. McChesney & Sons.

520 When duly accepted and made binding, said contract is amendable to the laws of the Hawaiian Islands in effect at date of signing.

Yours very truly,
William W. Bierce Ltd.,
By Frank Davies

Accepted in duplicate by The Kona Sugar Company Limited, By M. W. McChesney & Sons Agents this 22d day of February 1900.

Truss rods on card 4 in number, 1″ dia upset ends 1⅛″ in Turnbuckles 1″ Ltd.

W. W. Bierce Ltd.
By Frank Davies.

In pursuance of said contract the plaintiff duly shipped to Honolulu the material called for by the contract, except 188 tons of steel rails which were not shipped, to be paid for cash on delivery. Plaintiff also shipped in the same manner the following material, not called for by the contract:

1 Howe narrow gauge track scale capacity 25 tons.
1 set re-railers
4 track gauges 3 feet
1 rail bender
1 track drill
1 section car with seats
2 jacks

The aggregate purchase price called for by the contract was

about $45,000.00. As the material was shipped plaintiff drew a demand draft for the amount of each shipment on the Kona Sugar Company, Limited. These drafts with bills of lad-
521 ing attached made out to plaintiff went forward for collection until all of the equipment actually shipped arrived in Honolulu, and all of the drafts and bills of lading reached Bishop & Co .of Honolulu, bankers, for collection, but none were ever paid. Finally, plaintiff having been advised of the presentment for payment and non payment of said drafts, sent its agent, Mr. Harry T. Gilbert to Honolulu to collect the contract price of the material shipped. Gilbert arrived in Honolulu about January 1st. 1901, and found the Kona Sugar Co. Ltd, utterly unable to pay the drafts. He remained some two months and finally, in settlement of the original agreement, entered into the following agreement on March 13th, 1901.

Honolulu, H. T. Mar. 13, 1901.

Kona Sugar Company Limited,
Honolulu, H. I.

Gentlemen:

In pursuance of the verbal arrangement made between your President and William W. Bierce, Limited, we hereby offer the following terms in settlement of the contract between the Kona Sugar Company Limited and William W. Bierce Limited as evidenced by letter dated Feb 21, 1900, and accepted by the Kona Sugar Company Limited Feb. 22, 1900:

We will take in settlement of this contract the sum of $10,000, U. S. gold coin, and the promissory note of the Kona Sugar Company Limited for the sum of $37,044.53, in favor of William W. Bierce Ltd., payable six months after date at the Whitney National Bank in New Orleans, bearing interest at the rate of seven and one-half per cent (7½%) per annum and secured by First Mortgage Bonds of the Kona Sugar Company Limited of par value equal to the note, said bonds being portion of a duly authorized issue not exceeding $200,000. This offer is conditioned upon its acceptance by your payment of the money and the delivery of the note, with collateral, before 4 P. M. on Thursday, March 14th, A. D. 1901.

Upon such payment being made to us, before the hour named, we will deliver to you the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting delivery upon the express condition and understanding that said rails, locomotives, cars, scales

and other materials are and shall remain the property of
522 William W. Bierce, Limited, until the full payment of the note above described, according to its terms.

Very truly yours,

W. W. Bierce Ltd.
By H. T. Gilbert.

The above terms are accepted this March 13th, 1901.

The Kona Sugar Co. Ltd.
By its President
J. M. McChesney

(Seal)

By its Treasurer
F. W. McChesney

Received on account of above agreement exchange on New York for Ten Thousand Dollars and Seventy Six (76) $500-Bonds of the Kona Sugar Co. numbered from 1 to 76 both inclusive.

W. W. Bierce Ltd.
By H. T. Gilbert.

When this agreement was signed and delivered Gilbert received from the Kona Sugar Co. Ltd., the sum of $10,000 cash and the promissory note of the Company for the balance of the contract price, $37,044.53, payable six months after date with interest at 7-½%, and as collateral thereto, 76 first mortgage bonds, and thereupon Mr. Gilbert released the bills of lading from the drafts in question, and the property in question was delivered to the Kona Sugar Company, Limited. The testimony was to the effect that the contract of March 13, 1901 was an entire contract for a lump sum purchase price. After March 13, 1901 the railroad equipment in question was removed from Honolulu to the District of Kona, and the railroad of the Kona Sugar Company, Limited was constructed, some of the material, however, not being used in such construction.

523 In December 1901 the plaintiff again sent Mr. Gilbert to Hawaii to try and collect the amount of the note. The said note was endorsed over to him for this purpose and later on his failure to collect he endorsed it back to the plaintiff, the note having been endorsed to him for collection only. While he was in Honolulu, and on February 17, 1902, a Receiver of the Kona Sugar Company, Limited, was appointed by the Circuit Court of the Third Circuit, and took possession of the property of the Kona Sugar Co. Ltd., and of the rail-

road equipment. From February 1902 to May 9, 1903, three different receivers were appointed by the court from time to time, and the business of the plantation was carried on irregularly and intermittently by the receivers, the company continually getting deeper into debt and becoming more and more hopelessly insolvent.

On May 13, 1902, the plaintiff through its attorneys in Honolulu filed in the Circuit Court of the Third Circuit a notice of lien for the price of said railroad equipment on the said railroad equipment, and on August 1, 1902, brought suit against the Kona Sugar Company, Limited and its Receiver to enforce the said lien. Leave of court was obtained to bring the said suit.

It finally appearing that the business of the Kona Sugar Company, Limited, could not go on, the court on petition of counsel representing the Kona Sugar Company, Limited, entered a decree authorizing the sale of the Company's property subject to all liens thereon. The property was duly advertised, but could not be sold for lack of bidders. At about this time, and on January 23rd 1903 plaintiff discontinued its
lien suit which had never come on for trial, and early in
524 February 1903 obtained leave to bring by intervention a
suit in the nature of equitable replevin against the receiver of the Kona Sugar Company, Limited, leave to bring a legal action of replevin having been denied by the court.

On April 20th, 1903, and shortly after issue had been joined on plaintiff's petition in intervention and after it had sued out a commission to take the testimony of witnesses residing in Chicago, which had not been returned, the court of its own motion and without notice to plaintiff made another decree of sale ordering the property of the Kona Sugar Co. Ltd. sold free and clear of all liens and incumbrances. In pursuance of this decree all the right, title and interest of the Kona Sugar Co. Ltd. in its property and estate free and clear of all liens and incumbrances was sold to the defendant, who was an officer of said Kona Sugar Co. Ltd., for $12,250, said sale being confirmed by an order, dated Jun 1, 1903. The defendant then took possession of the property sued for in this action together with all the property of the Kona Sugar Co. Ltd. At said sale the plaintiff loudly protested to the defendant and all bystanders that it owned the property in question and was asserting and intended to assert its right and title thereto. The defendant had both record and actual notice of plaintiff's claim.

After the confirmation of said sale plaintiff on July 20th, 1903 asserted title to said railroad equipment and brought the present action of replevin in the Circuit Court of the Third Circuit relying on the contract of conditional sale of
525 March 13th 1901 with the Kona Sugar Co. Ltd. and asserted the title to said property retained in it by said contract. Defendant admitted taking possession of said property but claimed that he bought it under the aforesaid decree of sale, and that it was at that time the property of the Kona Sugar Co. Ltd. His principal defences were that plaintiff by filing its lien and bringing its lien suit had made a binding election of its rights and remedies and that the contract of March 13th. 1901 was an absolute sale or chattel mortgage and not a conditional sale. The Circuit Court of the First Circuit, before which the case was tried, the venue of said action having been duly changed to said First Circuit, found in substance that the contract of March 13th, 1901 was and was intended to be a conditional sale, that it was and was intended to be an entire contract for a lump sum consideration, that said contract covered both lienable and non lienable items, and, as the contract was entire, plaintiff could not have established a lien on any of said items, and that plaintiff had not intended to and did not in fact make any election of remedies or rights by bringing its lien suit or otherwise. Said court, before which the case was tried without a jury, rendered judgment for the return of the property to the plaintiff, and for $1,030 damages for its detention and also gave an alternative judgment for the value of the property, found to be $22,000, in case the property should not be returned.

Exceptions were taken to the Supreme Court of the Territory of Hawaii which held as a matter of law that there had been an election of rights by the plaintiff and sustained the exceptions on this ground.

(Endorsed): Filed May 11, 1905. George Lucas, Clerk.

526 Afterwards, to-wit, on the 16th day of May, 1905, in the October Term of said Supreme Court of the year 1904, in the record of the proceedings thereof in said entitled cause, appears the following entry, to-wit:

527 IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

October Term, 1904.

William W. Bierce, Limited, *Plaintiff.* *vs.* Clinton J. Hutchins, Trustee, *Defendant.*	Replevin.

ORDER.

The Plaintiff's motion herein filed that this Court make findings of fact in the above entitled cause, is denied, in as much as said cause came up on a bill of exceptions and this Court has no jurisdiction to make findings of fact in matters so presented.

By the Court.

GEORGE LUCAS
Clerk.

May 16th, 1905.

(Endorsed): Filed May 16, 1905. George Lucas. Clerk.

528 Thereupon, on the same day, to-wit, the 16th day of May, 1905, in the October Term of said Supreme Court of the year 1904, in the record of the proceedings thereof in said entitled cause, appear the following entries, to-wit:

529 IN THE SUPREME COURT, TERRITORY OF HAWAII.

October Term, 1904.

William W. Bierce, Limited, *Plaintiff.* *vs.* Clinton J. Hutchins, Trustee, *Defendant.*	Replevin.

To the Honorable, the Supreme court of the Territory of Hawaii.

The above named plaintiff, William W. Bierce, Limited, conceiving itself aggrieved by the judgment entered on the 6th. day of May, 1905, and also by the order made and entered on this 16th day of May, 1905, in the above entitled cause, doth hereby appeal from said judgment and order to the Supreme Court of the United States, and it prays that this its appeal may be allowed: and that a transcript of the record and proceedings and findings and papers upon which said judgment and order were made, duly authenticated, may be sent to the Supreme Court of the United States.

KINNEY, McCLANAHAN & COOPER
C. A. GALBRAITH
Attorneys for the Plaintiff.

Honolulu, May 16th, 1905.

And now, to wit: on May 16th, 1905, it is ordered that the appeal be not allowed as prayed for.

By the Court.
GEORGE LUCAS
Clerk.

530 We hereby accept service of the within application for allowance of an appeal and acknowledge receipt of copy thereof and stipulate that the same may be presented to the Court, at 9 o'clock A. M. May 16th, 1905.

CASTLE & WITHINGTON
Attorneys for Defendant.

Honolulu, May 15th, 1905.
Endorsed and Filed May 16, 1905.

531 SUPREME COURT OF THE TERRITORY OF HAWAII

October Term, 1904

Wm. W. Bierce Limited
v
Clinton J. Hutchins Tr

Honolulu, Tuesday May 16th 1905

CLERK'S MINUTES.

Petition and Motion for findings of fact Before Frear C. J. Hartwell and Wilder J.J.

Kinney, McClanahan & Cooper and S. H. Derby and C. A. Galbraith appeared for for the Plaintiff and J. W. Cathcart and Castle & Withington for the Defendant

Mr. Galbraith reads the Petition and Argues

Mr. Withington Argues

The Court denies the motion for the reason that said cause

came up on bill of exceptions, and this Court has no juris-
532 diction to make findings of fact in matters so presented.

Mr Galbraith then gave notice of Appeal to the United States Supreme Court, and filed a formal application for the allowance of an appeal to the United States Supreme Court from the final judgment entered in said cause on the 6th day of May 1905, and also from the Order refusing to make findings of fact this day entered therein.

The application for allowance of an appeal was than read

Mr. Galbraith argues

Mr Withington in opposition to the allowance of the appeal.

The Court denies the application for an appeal.

GEORGE LUCAS
Clerk.

533 Afterwards, to-wit, on the 6th day of June, 1905, in the October Term of said Supreme Court of the year 1904, came the plaintiff in said entitled cause, by its attorneys, and filed in the Clerk's office of said court its certain petition and motion, which are in the words and figures following, to-wit:

534 IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

October Term, 1904.

William W. Bierce Limited,
Plaintiff.
vs.
Clinton J. Hutchins, Trustee,
Defendant.
} Replevin.

PETITION AND MOTION FOR ALLOWANCE OF APPEAL FROM FINAL DECISION.

To the Honorable the Supreme Court of the Territory of Hawaii.

Comes now your petitioner William W. Bierce Limited, and respectfully shows to this Honorable Court that the matter and amount involved in the above entitled suit exceeds exclusive of interest and costs, the sum or value of $5,000.

That your petitioner feels aggrieved at the decision rendered by this Honorable Court in directing that the case be remanded to the Circuit Court with instructions to enter judgment for the defendant with costs, which said decision was rendered on May 6, A. D. 1905.

And your petitioner moves this Honorable Court to 535 allow an appeal to the Supreme Court of the United States from the decision aforesaid.

KINNEY, MCCLANAHAN & COOPER
C. A. GALBRAITH
Attorneys for petitioner.

Honolulu, May 31, 1905.

Endorsed and filed June 6th, 1905.

536 Thereupon, on the same day, to-wit, the 6th day of June, 1905, in the October Term of said Supreme Court of the year 1904, in the record of the proceedings thereof in said entitled cause, appears the following entry, to-wit:

537 SUPREME COURT OF THE TERRITORY OF HAWAII

October Term, 1904

W. W. Bierce Limited
v
Clinton J. Hutchins Tr }

Honolulu, Tuesday June 6th, 1905

CLERK'S MINUTES.

Petition and Motion for Allowance of Appeal from final decision

Before Frear C. J. Hartwell & Wilder J.J.

Kinney McClanahan & Cooper appeared for the Plaintiff and Castle and Withington for the Defendant.

Mr Cooper presents the petition and motion for allowance of Appeal and Argues.

The Court declines to entertain the motion at this time on the ground that the matter had been passed upon before.

GEORGE LUCAS
Clerk.

538 Afterwards, to-wit, on the 22nd day of June, A. D. 1905, in the October Term of said Supreme Court of the year 1904, came the plaintiff in said entitled cause, by its attorneys, and filed in the Clerk's office of said Court its certain petition and motion, which are in the words and figures following, to-wit:

539 IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

October Term, 1904.

William W. Bierce Limited,
Plaintiff.
vs.
Clinton J. Hutchins, Trustee,
Defendant.
} Replevin.

PETITION AND MOTION FOR ALLOWANCE OF APPEAL FROM FINAL JUDGMENT.

To the Honorable A. A. Wilder, Acting Chief Justice of the Supreme Court of the Territory of Hawaii.

Comes now your petitioner William W. Bierce Limited, and respectfully shows to this Honorable Court that the matter and amount involved in the above suit exceeds exclusive of interest and costs the sum or value of $5,000.

That your petitioner feels aggrieved at the decision and final judgment rendered by this Honorable Court on the 6th day of May A. D. 1905, wherein the judgment and findings of the trial court were reversed, and the exceptions, so far as they raise the question of election were sustained, and the judgment of the trial court reversed, and the case re-
540 manded to the Circuit Court with instructions to enter judgment for the defendants with costs.

And your petitioner moves that your Honor grant and allow an appeal to the Supreme Court of the United States from said decision and final judgment made and entered on the 6th day of May A. D. 1905.

And your petitioners will ever pray.

KINNEY, McCLANAHAN & COOPER
Attorneys for petitioner.

Dated June 21, 1905.

Endorsed: Filed June 22, 1905. Henry Smith Clerk.

541 Thereupon, on the same day, to-wit, the 22nd day of June, A. D. 1905, in the October Term of said Supreme Court of the year 1904, in the record of the proceedings thereof in said entitled cause, appears the following entry, to-wit:

542 IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

October Term 1904.

William W. Bierce Limited, *Plaintiff.*
vs.
Clinton J. Hutchins, Trustee, *Defendant.*
} Replevin.

ORDER.

The petition and motion for allowance of appeal from final judgment filed on the 22nd day of June A. D. 1905, is hereby disallowed on the ground that said motion in substance was presented on the 6th day of June, 1905, but refused by this Court, and the above petition and motion are this day refused.

(Signed) A. A. WILDER
Acting Chief Justice of the Supreme Court of the Territory of Hawaii.

Dated, June 22, 1905.

(Endorsed): Petition & Motion, etc. Filed, June 22, 1905 at 3:30 P. M. Henry Smith, Clerk.

543 Heretofore, to-wit, on the 2nd day of September, A. D. 1904, in the October term of said Supreme Court of the year 1903, in the record of the proceedings thereof appears the following entry, to-wit:

544 RULES OF THE SUPREME COURT.

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1. Entry of Cases on Calendar.

1. The clerk shall enter upon the calendar all cases brought to or pending in the court, in their proper chronological order.

2. In appeal cases, the appellant shall notify the clerk when

all requirements for entering a case upon the calendar have been complied with. If he fails to do so for ten days after such requirements have been complied with, the appellee may so notify the clerk. Upon receiving such notice the clerk shall enter the case upon the calendar, and the party so notifying the clerk shall forthwith notify the opposing party that the clerk has been so notified. If such notice is given to the clerk before all such requirements have been complied with, the case may be stricken from the calendar.

2. Call and Order of Calendar.

1. The court will call cases for argument or trial in the order in which they stand on the calendar, except that cases which have counsel on islands other than Oahu may be grouped so as to be heard at one session and except as hereinafter provided. Twenty cases shall be considered as liable to be called at each stated session. Sessions will be held beginning on the first Monday of each month during the term, unless otherwise ordered.

2. If the parties, or either of them, shall be ready to proceed when the case is called, the same will be heard, unless otherwise ordered for good cause shown. If neither party shall be ready, the case may be postponed or go to the foot of the calendar, as the court may order.

545 3. If a case is called at two sessions, and upon the call at the second session neither party is ready to proceed, it may be dismissed unless sufficient cause is shown for further postponement.

4. Criminal cases, cases in which the Territory is concerned and which also involve or affect some matter of general public interest, cases once adjudicated by this court on their merits and again brought up, writs of habeas corpus and extraordinary writs, may be advanced by leave or order of the court.

5. Two or more cases involving the same question may, by leave or order of the court, be heard together, to be argued as one case or more, as the court may order.

6. Any case may, by filed stipulation, be submitted on briefs without oral argument at any time during the term, irrespective of its position on the calendar.

7. Except as aforesaid, no case will be taken up out of its order on the calendar or be set down for any particular day

except upon special and peculiar circumstances to be shown to the court.

8. No stipulation or agreement of the parties to advance, pass or postpone a case, or to substitute one case for another, shall be binding upon the court. A case may be so advanced, passed, postponed or substituted only upon application made and leave granted in open court.

Briefs.

1. At least fifteen days before an appeal case is liable to be called for argument under the rules of this court, the appellant shall file with the clerk of this court three copies of a printed or typewritten brief and serve a copy thereof upon the appellee.

546 2. At least five days before the case is liable to be called for argument, the appellee shall file with the clerk three printed or typewritten copies of his brief and serve one copy thereof on the appellant.

3. At any time before the first day of the session at which the case is liable to be called the appellant may file a supplemental brief confined strictly to matter in reply to the brief of the appellee.

4. It will be a sufficient compliance with the foregoing provisions of this rule if the briefs are deposited in the mail, duly postpaid and addressed to the office address of the clerk or opposing counsel, as the case may be, in time to reach such address in due course of mail within the times limited in said provisions.

5. When, according to the foregoing provisions of this rule, an appellant is in default, the case may be dismissed; and when an appellee is in default, he will not be heard, except on consent of his adversary or on call of the court.

6. In cases brought originally in this court, briefs shal be filed on both sides at or before the argument, unless otherwise ordered by the court.

7. When evidence is referred to in a brief the page or pages on which it appears in the transcript shall be stated.

4. Oral Arguments.

1. The appellant or, in original cases, the petitioner, shall be entitled to open and conclude the argument of the case; but when the questions on appeal arise solely upon demurrer,

or otherwise solely upon the pleadings, the order of argument shall be the same as in the court below. When there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

547 Not more than two hours on each side will be allowed for argument without special leave of the court granted before the argument begins.

5. Rehearing.

A petition for rehearing may be presented only within thirty days after the filing of the opinion or the rendition of judgment unless by special leave granted during such thirty days. It shall briefly and distinctly state its grounds and a copy thereof shall be served upon the opposing party, who within ten days from such service may file an answer. If the case has been remitted to the lower court, it may be recalled for the purposes of the petition for rehearing.

6. Motions.

1. All motions shall be reduced to writing. No facts will be considered unless shown by the record or by affidavit.

2. A copy of the motion shall be served on the opposite party not less than forty-eight hours before the hearing, unless otherwise ordered by the court.

3. The motion day shall be the first day of each stated session.

4. Any motion of which notice shall have been given to the clerk in advance, shall be entered on the clerk's list in the order in which he receives such notice, and shall have priority in that order before other motions.

5. Not more than half an hour on each side shall be allowed for argument of a motion, without special leave of the court before the argument begins.

548 6. There may be united with a motion to dismiss, a motion to affirm on the ground that, although the record may show that the case is properly before this court, it is manifest that the appeal was taken for delay only or that the question involved is such as not to need further argument.

7. Transcripts of Evidence.

1. A suitable book shall be kept in the office of the clerk of the Supreme Court in which any party, desiring for use on appeal from a Circuit Court, or Judge, a transcript of the notes of evidence taken by a court stenographer in any case, may, after verdict or decision, enter his name, the name of the party he represents, the title of the case, the date of entry, and the name of the stenographer.

The clerk shall forthwith give notice of such entry to the stenographer who took the notes of evidence in the case.

The stenographer shall make and furnish the transcript with all reasonable dispatch in the order of such notice unless otherwise directed by a Justice of the Supreme Court or a Judge of a Circuit Court, and shall note on the transcript the date upon which it is furnished or tendered; and the name of the person to whom it is furnished or tendered; *provided*, however, that in cases in which the stenographer is entitled to payment for such transcript, he may within five days after receiving such notice request in writing the party who made the entry, to deposit cash, or furnish security, within ten days after such request, sufficient to cover the cost of such transcript, and unless such request is complied with within such time, such entry and notice shall be of no effect and the stenographer need not make such transcript; and *provided* further that after the stenographer shall have made any such transcript for which he is entitled to payment he need not furnish the same until paid for.

549 In case a party desires to make or procure a transcript or copy of the evidence without the aid of the court stenographer for use on any such appeal, he shall obtain from a Circuit Judge leave to file within a specified time such transcript or copy.

Unless such entry is made or such leave is obtained within ten days after the filing of the notice of appeal or bill of exceptions or the petition for a writ of error, and unless such transcript or copy of evidence is filed within ten days after it is tendered by a court stenographer or within the specified time when procured without the aid of a court stenographer, such transcript or copy of evidence will not be considered by the Supreme Court upon such appeal, error or exceptions.

2. In cases tried in circuits other than the first, such entry may be made by the clerk of this court upon receipt of a written request therefor which shall have been deposited in the

mail and properly postpaid and addressed to him within the time above prescribed for making such entry; and in cases tried in any such other circuit in which the evidence is taken down by a stenographer of the circuit court of such circuit, it will be sufficient if the clerk of the court of such circuit shall keep such a book and such entry shall be made therein and such notice thereupon given by such clerk to such stenographer.

8. Bills of Exceptions.

Bills of exceptions shall contain only such statements of facts or evidence and only such papers as may be necessary to explain the bearing of the rulings upon the issues or questions involved; undisputed facts shall be so stated, and not the evidence from which they are or may be deduced.

550 9. Writs of Error.

Cases brought up by writ of error, as well as those brought up by appeal or bill of exceptions, shall retain the title of the case below without reversing the order of the names.

10. Costs.

1. Attorneys shall be liable for costs of court incurred by their respective clients.
2. Bonds for costs on appeal to the Supreme Court shall be made to the Clerk of the Judiciary Department, filed in the court from which the appeal is taken and forwarded by such court to the Supreme Court.

11. Remittur.

1. When a case is remanded to a lower court, an order or mandate to be signed by the clerk, remitting the case, shall be prepared and presented by the prevailing party within ten days after receiving notice of the decision, unless a petition for a rehearing shall have been filed, in which case, such order shall be presented within ten days after the final disposition of the petition for rehearing. If the prevailing party fails to comply with this rule, the losing party may present such an order at any time thereafter.
2. Upon a remittur, the bill of exceptions, notice of ap-

peal, decision of the court, briefs of counsel, and all original papers filed in the Supreme Court, shall, unless otherwise directed by the court, be kept in the files of the Supreme Court. The other papers shall be returned to the lower court.

12. Papers.

No paper shall be taken from the files of the court except by permission of the court or a justice thereof.

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13. Library.

No book, pamphlet or magazine shall be taken from the Library of the Supreme Court (except for use in the Supreme Court or in the Circuit Court of the First Circuit) without the permission of a Justice of the Supreme Court or a Judge of the said Circuit Court.

14. Appeals From District Courts.

District Magistrates in all cases in which appeals have been taken and perfected from them to the Supreme Court, shall forward without delay to the Clerk of the Supreme Court a certificate of appeal, stating the nature of the action, the decision made, and the points of law upon which the appeal is taken; also, the original summons or warrant, all vouchers and exhibits filed, and a transcript of the testimony; also, all costs paid by either party to the action, with a clear and itemized statement showing by whom, and the purpose for which, each amount is paid, keeping back nothing but statutory fees and mileage, and stating explicitly what is kept back.

15. Defense of Title in District Courts.

Whenever, in the District Courts, in defense of an action of trespass, or a suit for the summary possession of land, or any other action, the defendant shall plead to the jurisdiction in effect that the suit is a real action, or one in which the title to real estate is involved, such plea shall not be received by the court, unless accompanied by an affidavit of the defendant, setting forth the source, nature and extent of the title claimed by defendant to the land in question, and such further particulars as shall fully apprise the court of the nature of defendant's claim.

552 16. Admission to the Bar.

1. Each applicant for admission to the bar shall file with the clerk an application setting forth his name, age, nationality, last place of residence and the character and term of his study. Sufficient certificates of the applicant's good moral character, and, if he is a member of the bar of any other court, the certificate of admission to such bar, shall accompany the application.
2. No applicant who is not a member of the bar of the highest court of some other state, territory or country, will be admitted or examined for admission to practice in this court unless, as a part of his preparation, he shall have studied diligently at least two years in a law school or the office of a competent attorney, or partly in such school and partly in such office.
3. No person who is not a citizen of the United States will be admitted unless he shall have bona fide declared his intention to become a citizen in the manner required by law.
4. No applicant whose application has been denied shall apply again for admission within one year thereafter.

17. Definitions.

Within the meaning of the rules of this court, whenever appropriate, appeal cases include cases brought up on bill of exceptions or writ of error; "appellant" and "appellee" include the plaintiff and defendant in error respectively; and "party," "appellant" and "appellee" and other words denoting the parties include their counsel.

The foregoing rules are hereby prescribed, to supersede all previous rules except those relating to grand juries.

By the Court:

George Lucas,
Clerk.

Honolulu, T. H., September 2, 1904.

553 Heretofore, to-wit, on the 7th day of April, A. D. 1905, in the October Term of said Supreme Court of the year 1904, in the record of the proceedings thereof appears the following entry, to-wit:

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

October Term, 1904.

AMENDMENT OF RULE.

Section 1 of Rule 2 of this Court, prescribed September 2, 1904, is hereby amended so as to read as follows:

1. The court will call cases for argument or trial in the order in which they stand on the calendar, except that cases which have counsel on islands other than Oahu may be grouped so as to be heard at one session and except as hereinafter provided. Twenty cases shall be considered as liable to be called at each stated session, provided, however, that, unless the court shall otherwise order, no case shall be liable to be called except by the consent of the parties thereto until twenty days after it shall have been placed on the calendar. Sessions will be held beginning on the first Monday of each month during the term, unless otherwise ordered.

Honolulu, April 7, 1905.

By the Court:

GEORGE LUCAS,
Clerk.

555 Heretofore, to wit, on the 3d day of October, A. D. 1905, in the October Term of said Supreme Court of the year 1905, in the record of the proceeding thereof appears the following entry, to wit:

556 IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

October Term, 1905.

——oOo——

AMENDMENT TO RULE 5.

It is ordered that Rule 5 be and the same is hereby amended so as to read as follows:

"5. Rehearing.

"A petition for rehearing may be presented only within twenty days after the filing of the opinion or the rendition of judgment unless by special leave granted during such twenty days; and shall briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be permitted to be argued unless a justice who concurred in the opinion or judgment desires it. If the case has been remitted to the lower court it may be recalled."

By the Court.

GEORGE LUCAS,
Clerk.

HONOLULU, October 3, 1905.

557 Heretofore, to wit, on the 8th day of December, A. D. 1905, in the October Term of said Supreme Court of the year 1905, in the record of the proceeding thereof appears the following entry, to wit:

558 IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

October Term, 1905.

——oOo——

AMENDMENTS OF RULES 8, 13 AND 14.

Rules 8, 13 and 14 are hereby amended so as to read as follows: the amendments of Rules 8 and 14 to take effect January 1, 1906.

"8. Record on Appeal, Error and Exceptions.

"1. On appeal, error or exceptions from any circuit court, circuit judge or district magistrate a certified printed or typewritten copy of so much and only so much of the record and papers as shall be necessary for the purposes of the appeal, writ or exceptions shall be transmitted to this court. No original paper shall be transmitted unless by order of this court or a justice thereof.

"2. A bill of exceptions shall state only so much of the papers and proceedings as shall be necessary for the disposition of the exceptions; it shall not state or include directly or by reference any pleadings, motions, rulings, findings, evidence or proceedings in whole or in part or otherwise than in substance or effect except so far as may be necessary.

"3. For entering the record and papers on appeal, error or exceptions in this court the costs shall be ten cents per folio. In case of a violation of the provisions of this rule against transmitting unnecessary papers, or including unnecessary papers or statements in bills of exceptions double costs for entering such unnecessary
559 papers and statements may be imposed upon the party responsible therefor"

"13. Library.

"No book, pamphlet or magazine shall be taken from the library of this court, except for use in this court or in the Circuit Court of the First Circuit, without the permission of a justice of this court or a judge of said Circuit Court; provided, however, that any member of the bar may take one or more text books, not exceeding three at any one time, upon giving a receipt therefor to the librarian or making an entry thereof in a book kept by the librarian for that purpose; and provided further that books may be taken for use in the United States District Court or by the United States District Judge upon the taker giving a receipt or making an entry. The taker of any book, pamphlet or magazine shall be responsible for the due return of the same within three days, or sooner if so required by the librarian, and, in case the same shall not be so returned, shall forfeit and pay fifty cents for each day's detention thereof beyond the time limited until the return thereof or the payment of twice the value thereof or cost of replacing the same. Any one taking a book, pamphlet or magazine without such permission or without giving such receipt or making such entry, as the case may be, shall be liable to suspension from the use of the library."

"14. Appeals From District Courts.

"District Magistrates in all cases in which appeals have been taken and perfected from them to the Supreme Court, shall forward without delay to the clerk of the Supreme Court a certificate of appeal, stating the nature of the action, the decision made, and the points of law upon which the appeal is taken; also, such certified copy of the record or papers as is required by Rule 8; also, all
560 costs paid by either party to the action, with a clear and itemized statement showing by whom, and the purpose for which, each amount is paid, keeping back nothing but statutory fees and mileage, and stating explicitly what is kept back."

By the Court:

GEORGE LUCAS,
Clerk.

HONOLULU, T. H., December 8, 1905.

561 Afterwards, to-wit, on the 13th day of January, A. D. 1906, in the October Term of said Supreme Court of the year 1905, came William W. Bierce, Limited, by its attorney, and filed in the Clerk's office of said court an authenticated copy of the order allowing an appeal, which said authenticated copy of the order aforesaid is in the words and figures following, to-wit:

562 SUPREME COURT OF THE UNITED STATES.

No. 14, Original, October Term, 1905.

Ex Parte In the Matter of William W. Bierce, Limited, Petitioner.

On consideration of the motion for leave to file the petition for writs of mandamus or certiorari herein,

It is now here Ordered by the Court, that said motion be, and the same is hereby, granted, and on consideration of the petition and of the record presented therewith it is ordered that an appeal from the judgment of the Supreme Court of the Territory of Hawaii in the case of William W. Bierce, Limited, a corporation, vs. Clinton J. Hutchins, Trustee, be, and the same is hereby, allowed on the appellant giving bond in the penal sum of $1,000, conditioned according to law, and approved by the Chief Justice of said Supreme Court or an Associate Justice thereof.

December 4, 1905.

A true copy.

Test:

(Seal of the Supreme
Court of the United
States.)

James H. McKenney,
Clerk of the Supreme Court of the United States.

(Endorsed):

SUPREME COURT OF THE UNITED STATES.

October Term, 1905.

Term No. 14, Original.

Order allowing appeal.

Filed Dec. 4th, 1905.

Filed January 13, 1906.

George Lucas,
Clerk.

563 On the same day, to wit, the 13 day of January, A. D. 1906, came William W. Bierce, Limited, a corporation, as principal, and Pacific Surety Company of California, as sureties, and filed in the Clerk's Office of said Supreme Court an appeal bond, which said appeal bond is in the words and figures following, to-wit:

564 Know All Men By These Presents, That we, William W. Bierce, Limited, a corporation, as principal, and Pacific Surety Company of California, as sureties, are held and firmly bound unto Clinton J. Hutchins, Trustee, in the full and just sum of one thousand dollars, to be paid to the said Clinton J. Hutchins, Trustee, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this thirteenth day of January, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a Supreme Court of the Territory of Hawaii in a suit depending in said Court, between William W. Bierce, Limited, a corporation, plaintiff, and Clinton J. Hutchins, Trustee, defendant, a judgment was rendered against the said plaintiff and the said plaintiff having obtained an appeal to reverse the judgment in the aforesaid suit, and a citation directed to the said Clinton J. Hutchins, Trustee, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date thereof.

Now, the condition of the above obligation is such, That if the said William W. Bierce, Limited, a corporation, shall prosecute said appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue. 565

(Seal of William W. Bierce, Limited, New Orleans, La.)

William W. Bierce, Limited,
By Columbus Bierce,
Vice-President.

Attest: E. W. Holden,
Secty.-Treas.

Sealed and delivered in presence of—
A. K. Y. Yap,
A. G. M. Robertson.

Pacific Surety Company, (Seal)
By H. B. Mariner, (Seal)
Attorney in fact.

Approved by— W. F. Frear,
Chief Justice of the Supreme Court of the Territory of Hawaii.

(Endorsed): Filed January 13, 1906. George Lucas, Clerk.

566 On the same day, to-wit, the 13th day of January, A. D. 1906, came William W. Bierce, Limited, by its attorneys, and filed in the Clerk's Office of said Supreme Court its assignment of errors, which said assignment of errors is in the words and figures following, to wit:

567 ASSIGNMENT OF ERRORS.

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

William W. Bierce, Limited,
Appellant,
vs.
Clinton J. Hutchins, Trustee,
Appellee.

And now comes the appellant, William W. Bierce, Limited, a corporation, by Charles H. Aldrich, Henry S. McAuley, Henry W. Prouty and A. G. M. Robertson, its attorneys, and upon the allowance of its appeal herein to the Supreme Court of the United States, presents and files herein its assignment of errors, as to which matters and things it says that in the record and proceedings aforesaid of said Supreme Court of the Territory of Hawaii in the above entitled cause, wherein William W. Bierce, Limited, was plaintiff and Clinton J. Hutchins, Trustee, was defendant, and in the rendition of the final judgment therein, manifest error has intervened to the great prejudice and injury of said William W. Bierce, Limited, in the following, among other things, to-wit:

First. Said Supreme Court of the Territory of Hawaii erred in entering judgment in said cause reversing the judgment rendered in said cause by the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in favor of said appellant for the return of 568 the property in controversy in said cause, or in case the same should not be returned, for the value thereof, found to be the sum of Twenty-two Thousand Dollars ($22,000.00) and interest thereon, and sustaining the exceptions of said appellee in so far as they raised the question of election.

Second. Said Supreme Court of the Territory of Hawaii erred in not affirming in all things the judgment rendered in said cause by the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in favor of said appellant and against said appellee, for the return of the property in controversy in said cause into the possession of said appellant, and for the sum of One Thousand and Forty-five Dollars ($1,045.00) damages for the detention of said property, together with costs of suit taxed at the sum of Fifty Dollars and Fifty Cents ($50.50), or in the alternative, in case said property should not be so returned, for the value thereof found and adjudged to be the sum of Twenty-two Thousand Dollars ($22,000.00) and for the sum of One Thousand and Forty-five Dollars ($1,045.00) damages for the detention thereof, together with the costs of suit taxed at the sum of Fifty Dollars and Fifty Cents ($50.50).

Third. Said Supreme Court of the Territory of Hawaii erred in sustaining the exceptions of said appellee, and each of them in said cause, in so far as such exceptions raised the question of an election by said appellant between inconsistent remedies, or between inconsistent remedial rights.

Fourth. Said Supreme Court of the Territory of Hawaii erred in sustaining the twenty-second exception of said appellee to the
569 finding of said Circuit Court in said cause, which said twenty-second exception is in the words and figures as follows, to-wit:

"Immediately thereafter plaintiff proposed the following finding:

"That the contract of March 13th, 1901, was an entire contract and intended so to be, for a lump sum consideration which consideration was incapable of being apportioned so as to make possible the ascertainment of the price of the lienable and nonlienable items thereof; to which finding the defendant objected as follows:

"Defendant objects to the 6th proposed finding of fact upon the ground that said so-called finding contains mixed questions of law and fact, and upon the further ground that the evidence in said cause shows that the said contract of March 13th, 1901, was not an entire contract nor intended so to be, but was a contract supplementary to the contract of February 21st, 1900.

"The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted and said ruling is here and now assigned as error by said defendant."

Fifth. Said Supreme Court of the Territory of Hawaii erred in sustaining the twenty-seventh exception of said appellee to the finding of said Circuit Court in said cause, which said twenty-seventh exception is in the words and figures as follows, to-wit:

"Immediately thereafter plaintiff proposed the following finding:

"That plaintiff did not at any time intend to, nor did it in fact waive its title to the property sued for, nor did it intend to, or in fact make any election of remedies or rights so as to bar the bringing of this action; to which findings the defendant objected as follows:

"Defendant objects to the 11th proposed finding of fact upon the ground that the same contains mixed questions of law and fact, and upon the further ground that the same is not supported by the evidence in said action.

"The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant."

Sixth. Said Supreme Court of the Territory of Hawaii erred in sustaining the twenty-eighth exception of said appellee to the 570 finding of said Circuit Court in said cause, which said twenty-eighth exception is in the words and figures as follows, to-wit:

"Immediately thereafter plaintiff proposed the following finding:

"That plaintiff did not intend to and did not in fact waive its title by bringing the action to enforce a material-man's lien against the Kona Sugar Company, Limited, and its Receiver; to which finding the defendant objected as follows:

"Defendant objects to the 12th proposed finding of fact upon the ground that the same is not supported by the evidence in said action.

"The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant."

Seventh. Said Supreme Court of the Territory of Hawaii erred in sustaining the fortieth exception of said appellee to the conclusion of law of said Circuit Court in said cause, which said fortieth exception is in the words and figures as follows, to-wit:

"Immediately thereafter plaintiff proposed the following conclusion of law:

"That the contract of March 13th, 1901, was an entire contract for a lump sum consideration and contained lienable and nonlienable items; to which conclusion the defendant objected as follows:

"Defendant objects to the 6th proposed conclusion of law upon the ground that the same is not supported by the evidence in said action, and is contrary to law.

"The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling of the court is here and now assigned as error by said defendant."

Eighth. Said Supreme Court of the Territory of Hawaii erred in sustaining the forty-first exception of said appellee to the conclusion of law of said Circuit Court in said cause, which said forty-first exception is in the words and figures as follows, to-wit:

571 "Immediately thereafter plaintiff proposed the following conclusion of law:

"That the plaintiff has made no election of either remedies or rights so as to bar the bringing and maintaining of this action; to which conclusion the defendant objected as follows:

"Defendant objects to the 7th proposed conclusion of law upon the ground that the same is not supported by any finding of fact herein, nor by the evidence in said action, and is contrary to law.

"The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant."

Ninth. Said Supreme Court of the Territory of Hawaii erred in ruling that said appellant was estopped from maintaining said action of replevin for the property in controversy in said cause, for the reason that said appellant had previously elected to pursue a remedy inconsistent therewith, namely, by bringing the action for the price of said property and to enforce a materialman's lien for the same.

Tenth. Said Supreme Court of the Territory of Hawaii erred in ruling that by bringing the action to enforce a materialman's lien for the price of the property in controversy in said cause, said appellant made a binding election to waive performance of the condition precedent reserved to it in the contract of March 13th, 1901, between said appellant and the Kona Sugar Company, Limited, in pursuance of which said property was delivered to said sugar company, namely, payment in full of the promissory note in controversy in said cause, and to treat the title to said property as in said The Kona Sugar Company, Limited, or the receiver thereof, such as to preclude said appellant from maintaining said action of
572 replevin for the possession of said property.

Eleventh. Said Supreme Court of the Territory of Hawaii erred in holding and construing said conditional sale contract of March 13th, 1901, in controversy in said cause, to be a severable contract and not an entire contract such as to prevent a severance of the price of the lienable items from the price of the nonlienable items of the property or materials in controversy in said cause.

Twelfth. Said Supreme Court of the Territory of Hawaii erred in not holding that said appellant had no right to maintain the materialman's lien proceedings, and that its attempt to exercise such nonexistent right was a mistake of remedy made in ignorance of its legal rights, and as such did not amount to an election between inconsistent remedies or remedial rights, such as to preclude said appellant from maintaining said action of replevin for the property in controversy in said cause.

Thirteenth. Said Supreme Court of the Territory of Hawaii erred in not holding that the special findings of fact by said Circuit Court were sufficient to sustain the said judgment of said Circuit Court.

Fourteenth. Said Supreme Court of the Territory of Hawaii erred in sustaining each and every of the exceptions of said appellee to the entering of said judgment by said Circuit Court in said cause which were sustained by the said Supreme Court.

573 Fifteenth. Said Supreme Court of the Territory of Hawaii erred in sustaining each and every of the exceptions of said

appellee to the rulings of said Circuit Court in said cause which were sustained by said Supreme Court.

Sixteenth. Said Supreme Court of the Territory of Hawaii erred in denying the petition of said appellant for a rehearing in said cause.

Wherefore, the said William W. Bierce, Limited, appellant, prays that for the errors aforesaid and other errors appearing in the record of said Supreme Court of the Territory of Hawaii in the above entitled cause to the prejudice of said appellant, the said judgment of the said Supreme Court of the Territory of Hawaii be reversed, annulled, and for naught esteemed, and that the said judgment of the said Circuit Court of the First Judicial Circuit of the Territory of Hawaii be in all things affirmed, etc., to the end that justice may be done in the premises.

CHARLES H. ALDRICH,
HENRY S. MCAULEY,
HENRY W. PROUTY,
A. G. M. ROBERTSON,
Attorneys for Appellant.

(Endorsed): Filed January 13, 1906. George Lucas, Clerk.

574 United States
of America. } ss.

To Clinton J. Hutchins, Trustee, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to an order allowing an appeal filed in the Clerk's Office of the Snpreme Court of the Territory of Hawaii wherein William W. Bierce, Limited, a corporation, is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii, this thirteenth day of January, in the year of our Lord one thousand nine hundred and six.

W. F. FREAR,
*Chief Justice of the Supreme Court
of the Territory of Hawaii.*

(Endorsed): Filed Jan. 13, 1906. George Lucas, Clerk.

Service of a copy of the within citation is hereby admitted this thirteenth day of January, A. D. 1906.

CASTLE & WITHINGTON,
Attorneys for Appellee.

CLERK'S CERTIFICATE.

575 Territory of Hawaii, } ss.
Island of Oahu. }

I, George Lucas, Clerk of the Supreme Court of the Territory of Hawaii, Do Hereby Certify the above and foregoing to be a true, correct and complete transcript of the record of all the proceedings had in said court in the cause wherein William W. Bierce, Limited, is the plaintiff and Clinton J. Hutchins, Trustee, is the defendant, as the same appear from the records and files of said court now remaining in my custody and control, including the appeal bond and assignment of errors, together with a true, correct and complete transcript of the record of all the rules of said court in force at all times on and subsequent to the 2nd day of September, A. D. 1904, and now in force, as the same appear from the records and files of said court now remaining in my custody and control, except only the rules of said court relating to grand juries, and that the original citation and proof of service thereof are hereto attached and herewith returned.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Honolulu, in the Island of Oahu, aforesaid, this 16 day of January, A. D. 1906.

George Lucas,
Clerk.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1905.

Office Supreme Court U. S.
FILED
FEB 28 1906
JAMES [illegible],
[illegible]

No. [redacted].212

WILLIAM W. BIERCE, LIMITED, Appellant,

vs.

CLINTON J. HUTCHINS, Appellee.

MOTION FOR WRIT OF SUPERSEDEAS.

Now comes the appellant, by Charles H. Aldrich, its solicitor, and moves the court that a writ of supersedeas issue herein, and that the bond heretofore given in said cause and shown at pages 350–351 of the printed record stand as the bond upon said supersedeas; and in support of said motion the appellant suggests:

First. That the appellee or those in privity with him have the possession of the property in controversy, and such supersedeas will in nowise affect the possession or control of said property.

Second. That such supersedeas is necessary to preserve the rights of the appellant against the sureties upon the bond given to the sheriff upon the seizure of the property.

And in support of such motion the appellant files herewith and makes a part hereof the affidavit of William W. Bierce, bearing date the twenty-fourth day of February, A. D. 1906.

Charles H. Aldrich,
Solicitor for Appellant.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1905.

WILLIAM W. BIERCE, LIMITED, *Appellant*,
vs.
CLINTON J. HUTCHINS, *Trustee*, *Appellee*.

Appeal from the Supreme Court of the Territory of Hawaii.

UNITED STATES OF AMERICA,
District of ——, } *ss:*

William W. Bierce, being first duly sworn, says that he now resides in the city, county, and Territory of Oklahoma, and until on or about the 1st day of May, A. D. 1905, was the president of William W. Bierce, Limited, a corporation created and existing by virtue of the laws of the State of Louisiana, which is the appellant in the above entitled cause; that as such president he has heretofore had active personal charge of the business and transactions involved in said suit and out of which said cause arose, as well as of the prosecution of said cause in both the courts below; that he, this affiant, still has a substantial pecuniary interest in said corporation, its property and rights, and makes this affidavit in its behalf and in support of the application it is about to make as the appellant in said cause for an order of court awarding a writ of supersedeas in said cause commanding the justices of the supreme court of the Territory of Hawaii to stay all proceedings on the judgment of the said supreme court of the Territory of Hawaii in said cause pending said appeal.

Affiant further says that for convenience he hereinafter mentions the parties to said cause by the titles and according to the positions they occupied in the court below, said appellant, William W. Bierce, Limited, as plaintiff and said appellee, Clinton J. Hutchins, trustee, as defendant.

Affiant further says that the necessity for the issuance of such writ of supersedeas in said causes arises in the following manner—that is to say, that, as shown by the sheriff's return to process of replevin issued in said cause at the time of the beginning thereof, on or about the 20th day of July, A. D. 1903, which return bears date the 22d day of July, A. D. 1903, the property levied upon by said sheriff by virtue of said process and in controversy in said cause, consisting of three hundred and sixty-two tons of steel railroad rails, two railroad locomotives, sixteen cane cars, and other plantation railroad equipment and material, was released to said defendant by said sheriff from the levy of said process and returned to said defendant upon the filing by him of a written undertaking for double the supposed value of the property so levied upon, which said process and return are shown upon pages 61 to 65, both inclusive, of the original transcript of the record in said cause filed in this court and upon pages 45 to 47, both inclusive, of the printed transcript of said record filed in this court.

That said undertaking mentioned in said sheriff's return is a so-called return or redelivery bond in the sum of thirty thousand dollars ($30,000.00), bearing date the 21st day of July, A. D. 1903, made by said defendant, Clinton J. Hutchins, trustee, as principal, and by Henry Waterhouse and Arthur B. Wood as sureties, and is conditioned for the delivery of all said property in controversy in said cause to said plaintiff, if such delivery be adjudged, and for the payment to said plaintiff of such sum as may for any cause be recovered against said defendant, and was filed in the circuit court in which said suit was begun on or about the 1st day of August, A. D. 1903, and still remains in the custody of said circuit court, and is shown on pages 66 and 67 of said original transcript and on pages 48 and 49 of said printed transcript.

That in the months of January and February, A. D. 1904, affiant made a trip from his place of residence, in Oklahoma

City aforesaid, to the city of Honolulu, in the island of Oahu, in said Territory, where he arrived on or about the 8th day of February, A. D. 1904, for the purpose, among others, of attending the trial of said cause as a witness on the part of said plaintiff, and on said trip remained in the city of Honolulu aforesaid about two months, or until on or about the 1st day of April, A. D. 1904; that while on said trip affiant was present at the trial of said cause in the circuit court of the first judicial circuit of said Territory, sitting at the city of Honolulu aforesaid, from about the 7th until the 12th day of March, A. D. 1904, and testified on said trial as a witness on the part of said plaintiff, and remained in the city of Honolulu aforesaid until some time after the entry of final judgment in said cause by said circuit court, on the 19th day of March, A. D. 1904, in favor of said plaintiff and against said defendant, as shown upon pages 425 to 428, both inclusive, of said original transcript and upon pages 273 to 275, both inclusive, of said printed transcript.

That in the month of May, A. D. 1904, after affiant's return from the city of Honolulu aforesaid to his place of residence, in Oklahoma City aforesaid, he was advised by letters received from counsel for said plaintiff residing in said city of Honolulu that said defendant had taken said cause up to the supreme court of said Territory for review by bill of exceptions in the nature of an appeal, for which purpose said defendant had executed and filed in said circuit court a certain bond upon exceptions running to the clerk of the judiciary department of said Territory, in the sum of one thousand dollars ($1,000.00), conditioned for the payment of court costs upon such exceptions in said cause in said supreme court, and further conditioned that the said defendant should not to the detriment of said plaintiff remove or otherwise dispose of any property he might have liable to execution on said judgment pending such exceptions, which said bond had been approved by said circuit court, and by virtue of the laws of said Territory operated as an arrest of judgment and stay of execution on said judgment, provided, however, that said circuit court might, upon good cause shown, allow execution to issue or other appropriate action to be taken for the enforcement of said judgment, and, further, that said counsel in behalf of said plaintiff had made application to said circuit court and therein shown such cause, and thereby caused execution to issue on said judgment in said cause, and that said sheriff had attempted to levy said execution upon the property in controversy in said cause, but had been unable to take the same in execution thereunder, because said defendant had dispôsed of said property to third persons into whose possession the same had passed, and was also unable under said execution to make the moneys, or any part thereof, recovered by said plaintiff from said defendant by said judgment whereon said execution had been issued; wherefore said sheriff had returned said execution into said circuit court wholly unsatisfied.

That in the month of June, A. D. 1904, affiant was advised by letters received from counsel for said plaintiff residing in Honolulu that shorty prior to the 4th day of April, A. D. 1894, said Henry Waterhouse, one of the sureties on said return or redelivery bond, had departed this life at the city of Honolulu aforesaid, leaving an estate in said Territory of the estimated value of two hundred and forty thousand dollars ($240,000.00) in excess of all debts and liabilities of said Waterhouse, and leaving a last will and testament, wherein he had nominated and appointed William Waterhouse and Albert Waterhouse executors thereof; that said will had been admitted to probate and letters testamentary issued thereon to said executors by the court of said Territory having jurisdiction in that behalf, and that in pursuance of the statutes of said Territory said executors had, on the 4th day of April, A. D. 1904, published notice in a newspaper published in the city of Honolulu aforesaid to all creditors of said Henry Waterhouse, deceased, to present their claims, duly authenticated and with proper vouchers, to said executors within six months from the date of such publication; that, according to the provisions of the statutes of said Territory in that behalf, any claim against the estate of said Henry Waterhouse, deceased, must be presented to said executors within six months after the 4th day of April, A. D. 1904, and prior to the 4th day of October, A. D. 1904, or be forever barred by the statutes of said Territory, with an exception as to a claim not due, which must be so presented within six months after it fell due, or be forever barred by said statutes; that, in accordance with further provisions of said statutes, in the event of the rejection by said executors of a claim so presented, a suit must be brought thereon in the proper court of said Territory against said executors within two months after such rejection, or within two months after such claim should become due, or else it would be forever barred by said statutes; that thereupon affiant consulted other counsel for said plaintiff concerning the matter of the presentation to said executors of a claim by said plaintiff upon said return or redelivery bond, and the advisability of bringing suit against said executors thereon in the event of their rejection of such claim, and in the month of July, A. D. 1904, was advised by such other counsel that by reason of said plaintiff's exercise of its right under the statutes of said Territory to have execution issue on said judgment, and of the failure of said defendant to deliver the specific property in controversy in said cause to the plaintiff and of his failure to pay to the plaintiff the moneys recovered against him by said judgment, the conditions of said return or redelivery bond had been broken and a cause of action thereon had accrued to said plaintiff against the principal and surviving surety thereon, as well as against said executors of Henry Waterhouse, the deceased surety thereon, and that unless said plaintiff should present its claim for damages on said bond for such breach or breaches thereof the said executors within six months from the 4th day of April, A. D.

1904, and, in the event of the rejection of such claim by said executors, bring suit thereon against them within two months after such rejection, such claim and cause of action would be forever barred by the statute of limitations of said Territory as against said executors and the estate of said Henry Waterhouse, deceased; that thereafter, and on or about the 1st day of August, A. D. 1904, affiant, as the president of said plaintiff corporation, by letter mailed to said counsel for said plaintiff residing in the city of Honolulu aforesaid, requested and instructed said counsel at once to present to the said executors said plaintiff's claim on said bond, and in the event of the rejection thereof by said executors immediately to bring suit thereon in the name and behalf of said William W. Bierce, Limited, against said executors and the surviving obligors on said bond, and that some time thereafter affiant was duly advised by letters received from said counsel that they had presented such claim in due form to said executors on the 30th day of September, A. D. 1904, that said executors had rejected the same, and that they, said counsel, thereupon, and on or about the 11th day of October, A. D. 1904, and within the time limited for that purpose by said statutes of said Territory, had begun an action of assumpsit on said bond in the circuit court of the first judicial circuit of said Territory in the name and in behalf of said William W. Bierce, Limited, against said Clinton J. Hutchins, trustee; Arthur B. Wood and William Waterhouse and Albert Waterhouse, as executors of the last will and testament of said Henry Waterhouse, deceased, for the recovery of the plaintiff's damages for breach of the conditions of said bond or for the value of said property assessed at the sum of twenty-two thousand dollars ($22,000.00) and recovered against said defendant, Clinton J. Hutchins, trustee, in and by said judgment, with interest thereon from the 19th day of March, A. D. 1904, and that thereafter such proceedings were duly taken and had in said action on said bond that by the service of process and by the voluntary entry of their appearance therein jurisdiction was duly acquired of the persons of the defendants therein by said circuit court, and that all of said defendants duly appeared in said action on said bond in said circuit court and filed therein their formal answers to the plaintiff's complaint therein, traversing the averments thereof and denying their liability in said action.

That since the property in controversy in the above-entitled cause was released to said defendant by said sheriff from the levy of said process of replevin and returned to said defendant, on or about the 22d day of July, A. D. 1903, as aforesaid, none of said property has been returned or delivered to said plaintiff or to any one representing it, nor has the value of said property assessed and recovered by said judgment to the amount of twenty-two thousand dollars ($22,000.00), or any part thereof, ever been paid to said plaintiff or to any one representing it.

That during affiant's said trip to the city of Honolulu aforesaid he met and became personally acquainted with said defendant, Clinton J. Hutchins, trustee, and became personally familiar with his financial standing and condition, and that on numerous occasions since said trip affiant has been advised by letters received from counsel for said plaintiff residing at the city of Honolulu aforesaid respecting the financial standing and condition of said defendant Hutchins, as well as respecting the property and financial condition of said surviving surety, Arthur B. Wood, and that affiant is thereby informed and believes that said defendant, Clinton J. Hutchins, trustee, is a person of little or no financial responsibility and of doubtful solvency, and has no property situated within the Territory of Hawaii or elsewhere out of which said judgment for the value of said property, or any considerable portion thereof, could be collected by execution or otherwise, and that said surviving surety, Arthur B. Wood, is likewise a person of little or no financial responsibility and of doubtful solvency, and has no property situated within the Territory of Hawaii or elsewhere out of which said judgment for the value of said property, or any considerable portion thereof, could be collected by execution or otherwise, and that said Wood, prior to the month of April, A. D. 1904, permanently removed from said Territory of Hawaii, and also removed therefrom and otherwise disposed of all of his property previously situated within said Territory, and took up a new residence in some place without said Territory, but that affiant by making diligent search and inquiry for that purpose has been unable to learn the present place of residence of said Wood or what property, if any, he owns without said Territory, and that the only effectual recourse said plaintiff now has for the recovery of the value of said property is against said executors and estate of said Henry Waterhouse, deceased, in said action on said return or redelivery bond, which said action is still pending and undetermined in said circuit court.

Affiant further says that he has been lately advised by counsel for said plaintiff residing at Honolulu that when said action on said bond was reached on the call of the trial calendar of said circuit court, at the beginning of the last January term thereof, the defendants in said action, by their counsel, opposed said plaintiff's application for a continuance thereof, but that said circuit court nevertheless ordered said cause to be continued until the next April term thereof, beginning on the 2d day of April, A. D. 1906, but has since allowed said defendants an interlocutory bill of exceptions from such order of continuance to the supreme court of said Territory, whereon they are seeking a review of such order of continuance in said supreme court, with directions to said circuit court to proceed to try said cause at said next April term thereof, which trial, if forced by the action of said territorial courts pending said appeal, could only result in a judgment in favor of the defendants in said action on said bond and against said plaintiff or in a judgment of dismissal or nonsuit, and that in the event said action on said bond should be so disposed of by said circuit court a new action on said bond for the value of said property could not be maintained against said executors, the bar of said statute of limitations having long since become complete against the maintenance of such new action, and that in such event the further prosecution of said appeal, even although the same should result in a decision and judgment by this honorable Supreme Court of the United States reversing the judgment of the supreme court of said Territory in said cause and affirming the judgment of said circuit court in said cause, would nevertheless be ineffectual and idle, and wholly fruitless to said appellant.

And further affiant saith not.

Wm. W. Bierck.

Subscribed and sworn to before me this 24th day of February, A. D. 1906.

Marion L. Spitler,
United States Commissioner.

United States of America, } ss:
Territory of Oklahoma, }

I, B. D. Shear, the duly appointed, qualified, and acting clerk of the district court for the third judicial district of Oklahoma Territory, do hereby certify that the Honorable B. F. Burwell, judge of said court, did on the 18th day of May, A. D. 1903, appoint Marion L. Spitler a United States commissioner in and for said district.

I further certify that on the said 18th day of May, A. D. 1903, the said Marion L. Spitler, appointed as aforesaid, did duly qualify, take the oath of office, and assume the duties of said office; that said appointment so made has never been suspended or revoked, and that the said Marion L. Spitler is now and has been ever since said 18th day of May, A. D.

1903, the duly appointed, qualified, and acting United States commissioner in and for said district.

Witness my official signature and the seal of said court this 24th day of February, A. D. 1906.

[Seal District Court, Territory of Oklahoma.]

B. D. Shear,
Clerk of said Court.
Anne Hoover,
Deputy Clerk.

[20519]

FILE COPY.

Office Supreme Court, U. S.
FILED.
MAR 9 1907
JAMES H. McKENNEY,
CLERK.

No. **212.**

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D., 1906.

WILLIAM W. BIERCE, Limited, **a corporation,** *Appellant,* *vs.* **CLINTON J. HUTCHINS, trustee,** *Appellee.*	**Appeal from** Supreme Court, Territory of Hawaii.

Brief and Argument on behalf of William W. Bierce, Limited, Appellant.

CHARLES H. ALDRICH,
HENRY S. MCAULEY,
HENRY W. PROUTY,
ATTORNEYS FOR APPELLANT.

BARNARD & MILLER, PRINTERS, CHICAGO

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1905.

No. 212.

WILLIAM W. BIERCE, Limited, a corporation, *Appellant,* *vs.* **CLINTON J. HUTCHINS, trustee,** *Appellee.*	**Appeal from** Supreme Court, Territory of Hawaii.

Brief and Argument on behalf of William W. Bierce, Limited, Appellant.

This is an appeal granted by this court from the Supreme Court of the Territory of Hawaii.

In the trial court the facts were found as follows (Rec., 266-269):

"1.

That William W. Bierce, Limited, plaintiff, and the Kona Sugar Company, Limited, on February 21st, 1900, entered into the contract of that date attached to the deposition of Columbus Bierce, read in evidence.

2.

That the personal property sued for in this action was duly shipped to Honolulu, bills of lading having been taken out in the name of the plaintiff, but said property did not pass into the possession of the Kona Sugar Company, Limited, until after the contract of March 13th, 1901, was entered into.

3.

That on March 13th, 1901, plaintiff, and the Kona Sugar Company, Limited, entered into the contract of that date attached to plaintiff's complaint as Exhibit A.

4.

That the payment of $10,000 under the contract of March 13th, 1901, and the giving of the note for $37,044.53, secured by the bonds of the Kona Sugar Company, Limited, was intended to be and was in settlement of the contract of February 21st, 1900, and said cash and said note and bonds were not given nor were they intended as the consideration for the purchase price of the materials sued for.

5.

That the condition precedent, the performance of which was to divest the plaintiff of title to the property sued for, was intended by the parties to be the payment of the note of $37,044.53 given in settlement of the contract of February 21st, 1900.

6.

That the contract of March 13th, 1901, was an entire contract, and intended so to be, for a lump sum consideration, which consideration was incapable of being apportioned so as to make possible the ascertainment of the price of the lienable and non-lienable items thereof.

7.

That by entering into the contract of March 13th, 1901, the contract of February 21st, 1900, was intended to be settled and adjusted.

8.

That both the plaintiff and the Kona Sugar Company, Limited, intended said contract of March 13th, 1901, to operate as a conditional sale of the property sued for and not as a chattel mortgage, or an absolute sale with lien reserved in the vendor.

9.

That in view of all the circumstances of the case said contract of March 13th, 1901, was a conditional sale and not a chattel mortgage, or absolute sale with lien reserved in the vendor.

10.

That some of the property sued for in this action, including railroad rolling stock, was not in fact used in the construction of the railway of the Kona Sugar Company, Limited, and was not lienable.

11.

That plaintiff did not at any time intend to, nor did it in fact waive its title to the property sued for, nor did it intend to, or in fact make any election of remedies or rights so as to bar the bringing of this action.

12.

That plaintiff did not intend to, nor did it in fact waive its title by bringing the action to enforce a materialman's lien against the Kona Sugar Company, Limited, and its receiver.

13.

That the acts of the plaintiff prior to the beginning of this action did not amount to a rescission of the contract of March 13th, 1901, and said contract as a matter of fact has not been rescinded.

14.

That the defendant attempted to purchase and did in fact take possession of the articles sued for, with knowledge, both record and actual, of the plaintiff's claim and title thereto.

15.

That the actual value of said articles sued for was, at the time of bringing this action, and now is the sum of $22,000.

16.

That plaintiff has suffered damages from defendant's detention of the property in the sum of $1,045.00, being interest at six per cent. on said sum of $22,000 from June 1st, 1903, to the date of judgment herein.

17.

That each and every material allegation in plaintiff's complaint has been established by the evidence.

The foregoing findings of fact is hereby allowed this 19th day of March, 1904.

(Signed) J. T. DEBOLT,
First Judge."

And conclusions of law as follows (Rec., 270-271):

"1.

That the defendant is not in a position to be able to deny or require proof of plaintiff's corporate existence.

2.

That the contract of February 21st, 1900, was adjusted and settled between the parties by the contract of March 13th, 1901.

3.

That the contract of March 13th, 1901, between plaintiff and the Kona Sugar Company, Limited, was a conditional sale and not a chattel mortgage or absolute sale with lien reserved in the vendor, and under it plaintiff held title to the property sued for.

4.

That the payment of $10,000 under the contract of March 13th, 1901, and the giving of the note therein for $37,044.53 secured by the bonds of the Kona Sugar Company, Limited, was in settlement and adjustment of the contract of February 21st, 1900, and neither said cash or said note and bonds were given as a consideration for the purchase price of the materials sued for.

5.

That the condition precedent, the performance of which was to divest the plaintiff of title to the property sued for, was the payment of the note of $37,044.53, which had been given as one of the considerations for the settlement of the contract of February 21st, 1900.

6.

That the contract of March 13th, 1901, was an entire contract for a lump sum consideration and contained lienable and non-lienable items.

7.

That the plaintiff has made no election of either remedies or rights so as to bar the bringing and maintaining of this action.

8.

That plaintiff is entitled to judgment against the defendant for the return of the property sued for and damages for its detention, and in the event of defendant's inability to return the said property, plaintiff is entitled to judgment for $22,000, its value, and also damages for its detention.

The foregoing conclusions of law is hereby allowed this 19th day of March, 1904.

(Signed) J. T. DeBolt,
First Judge."

The contract of February 21, 1900, referred to in the finding of facts, is set forth in the record (Rec., 145-150). As the property was not delivered under this contract, the purchasers not being prepared to make payment, it is not deemed necessary or proper by us to print such contract as a part of this statement of facts. The goods purchased were shipped to Honolulu, bills of lading being taken in the names of the shippers as stated in finding 2, *supra,* and upon the purchasers failing to make payment the goods remained in a warehouse pending the execution of the conditional sale contract mentioned in the third finding of fact.

This contract was as follows (Rec., 153):

"Honolulu, H. I., March 13, 1901.

Kona Sugar Company, Limited,
Honolulu, H. I.

Gentlemen:

In pursuance of the verbal arrangement made between your President and William W. Bierce, Limited, we hereby offer the following terms in settlement of the contract between the

Kona Sugar Company, Limited, and William W. Bierce, Limited, as evidenced by letter dated Feb. 21, 1900, and accepted by the Kona Sugar Company, Limited, Feb. 22, 1900:

We will take in settlement of this contract the sum of $10,000, U. S. gold coin, and the promissory note of the Kona Sugar Company, Limited, for the sum of $37,044.53, in favor of William W. Bierce, Limited, payable six months after date at the Whitney National Bank in New Orleans, bearing interest at the rate of seven and one-half per cent. (7½%) per annum and secured by First Mortgage Bonds of the Kona Sugar Company, Limited, of par value equal to the note, said bonds being portion of a duly authorized issue not exceeding $200,000. This offer is conditioned upon its acceptance by you, payment of the money, and the delivery of the note, with collateral, before 4 P. M. on Thursday, March 14th, A. D. 1901.

Upon such payment being made to us before the hour named, we will deliver to you the bill of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting delivery, upon the express condition and understanding that said rails, locomotives, cars, scales and other materials are and shall remain the property of William W. Bierce, Limited, until the full payment of the note above described, according to its terms.

Very truly yours,
(Signed) W. W. BIERCE, LTD.,
By H. T. GILBERT.

The above terms are accepted this March 13th, 1901.

THE KONA SUGAR CO., LTD.,
By its President, J. M. MCCHESNEY.
By its Treasurer, F. W. MCCHESNEY."

As found by the court and shown by the record (Rec., 137) the property was delivered to the Kona

Sugar Company immediately after the execution of the agreement of March 13, 1901.

The matters referred to in the findings 11-13, inclusive, are as follows: The Kona Sugar Company became financially embarrassed and passed into the hands of a receiver in the early part of 1902 (Rec., 212). The appellant's claim was placed in the hands of Kinney, McClanahan & Cooper, attorneys at Honolulu, by Mr. Gilbert, agent of appellant. This firm had claims of a great many other creditors (Rec., 95). Mr. McClanahan testified (Rec., 95-97):

> "As a result of a great many conferences between the officers of the Kona Sugar Co. and bondholders, stockholders and creditors, a committee was appointed, called a bondholders' committee, for the purpose of superintending the affairs of the corporation, which were then in the hands of a receiver, with the idea of and with the purpose of taking off the crop of sugar that was then maturing and realizing the sale of the sugar as an asset in order to pay the creditors of the corporation and clear its debts. This committee agreement was submitted to the court and received its approval, and under it for some time the receiver worked. The committee consisted of Cecil Brown, S. M. Damon and Mr. Humburg of Hackfield & Co. Prior to the making of this committee agreement on the 12th of May, we filed a notice of lien in this suit —in this matter. This lien was discontinued on the first of August, 1902. No suit was brought on this lien on the first of August, 1902, and on the 23rd of January, 1903, the suit was discontinued.
>
> "All of the acts which we did for Bierce & Co. at this time prior to the discontinuance of the suit looked towards the possible chance or possibility of saving the corporation's property. Everything was done to prevent an entire

liquidation and surrender, the loss of all these assets. When this purpose was finally abandoned it was because it was found to be impossible to save any of the assets of the corporation to pay anybody. We found that the receivers were running behind even in their receiver charges and couldn't pay the charges of the receiver itself; the receiver's certificates could not be paid. When this state of affairs came about and it was found then to be absolutely abortive and useless to attempt to do anything for the rehabilitation of the plantation, we then abandoned our mechanic's lien suit, dismissed it and had recourse to our replevin suit.

"We didn't take this action in the first instance because we knew that to take those rails back, off the property of the Kona Sugar Co., would mean a collapse of the company at once, with loss of thousands to the creditors, because the railroad was absolutely essential to taking off a certain portion of the crop of the Kona Sugar Co., and the only reason for filing this lien which we thought we had a right to file at the time, without looking it up very carefully, the only reason for filing it was simply to fortify our position as a possible creditor or claimant of the estate.

"The Court: At the time the lien was filed did Bierce & Co. claim the title to the property now in question?

"A. I will say this in answer to that, That Bierce & Co. have never done anything but claim the title to the property under the conditional contract.

"The Court: Upon what theory did they expect to have a lien on the property as their own?

"A. When we filed this lien there was a certain provision in this creditors' contract which provided for a priority of payment of claims, and lien holders were preferred over certain other holders. We gave no thought whatever,

> at the time of filing the lien, to whether it was a valid lien or whether it was an invalid lien. We have since learned that it was absolutely a nullity and of no value whatever to Bierce & Co., the filing of this suit. This is Bierce & Co.'s position from the start, so that they as bondholders occupied a more secure position in order to get their money than as lienholders or common creditors, and it was the desire of Bierce to get their money in some way. They didn't want the property at the time, they wanted the money; they wanted the contract carried out; they wanted the note of the Kona Sugar Co. paid, and we simply filed this lien at the time as an additional lever on the—hold on the material so furnished. That is all."

On cross-examination the witness stated that the lien was filed May 12, 1902. Suit was brought thereon August 1, 1902, which was discontinued January 25, 1903 (Rec., 98).

The complaint asserting this lien, and filed August 1, 1902, is found at p. 246 *et seq.* of the record, and the notice at p. 251 *et seq.* No action of any kind was ever taken by the court upon this claim of lien. It was dismissed without trial of any kind.

In November the appellant filed its motion and petition of intervention to have the sale ordered by the court made subject to its lien (Rec., 255-265).

In February, 1903, the appellant, having dismissed its claim to a lien, moved the court for leave to join the receiver as a party defendant in a proposed action of replevin, which motion was denied (Rec., 208-209).

Thereafter it attended the sale of the assets made under order of court, and gave public notice to all bidders that it claimed the title to said property (Rec., 179-180). C. J. Hutchins, trustee, attempted to purchase and did, in fact, take possession of the property, with knowledge both record and actual, of appellant's claim and title thereto (Rec., 269; Finding 14). The record fails to disclose for whom Hutchins acted, but the presumption is strong that it was for the other creditors. If he had represented strangers to the record, *bona fide* purchasers, that fact would have been brought out in the evidence in the court below.

Demand for the return of the property was made upon Hutchins (Rec., 180), and this being refused, an action of replevin was brought against him (Rec., 37-47), and a seizure made upon the property (Rec.. 47). The defendant superseded the seizure by giving a return bond (Rec., 48).

It was in this replevin action that the finding of facts and conclusions of law heretofore set out in this statement were made.

From this action of the lower court, a writ of error was prosecuted to the Supreme Court of the territory, which reversed the conclusions of the lower court upon the question of election of remedies. The opinion of the court is in the record (Rec., 293).

The opinion shows that the facts found by the lower court are in nowise doubted or disturbed.

The court says (Rec., 299):

> "It has been settled in this jurisdiction that the findings of fact of a trial court, jury waived, have the same force as the verdict of a jury, but upon the question of election in this case the

> material facts are undisputed and the construction of the contracts, which are in writing, is a matter of law for the court. Under such circumstances this court may reverse the findings and judgment of the trial court, and it does so in this case.
>
> The exceptions, so far as they raise the question of election, are sustained, the judgment of the trial court is reversed and the case is remanded to that court for such further proceedings as may be proper."

A petition and motion for rehearing was filed in the Supreme Court in apt time (February 25, 1905, Rec., 299-302), and on April 13, 1905, the court filed in the office of the clerk thereof a written request for further argument by counsel upon the motion for a rehearing (Rec., 303-304), and set down the case for such reargument on April 18, 1905. On April 29, 1905, it reaffirmed its former opinion (Rec., 305-311). Hartwell, J., also filed a concurring opinion (Rec., 312-315). Judgment of reversal was entered May 2, 1905, carefully limiting the effect of such reversal to the legal conclusions derivable from the acts of the parties as to the question of election of remedies (Rec., 316). Upon the petitioner giving notice that it would have no further evidence to offer in the court below, the Supreme Court modified its judgment May 6, 1905, by adding directions that the Circuit Court enter judgment for the defendant with costs (Rec., 319-320).

The petitioner gave notice of an intention to appeal the cause to this court under the Act of March 3, 1905, and to that end suggested to the court that it make a statement of the facts of the case in the nature of a special verdict in order that this court might pass upon the merits, and tendered a statement of facts as petitioner conceived them to be established in the record (Rec., 322-333). This motion was disposed of by the following order (Rec., 333):

> "The plaintiff's motion herein filed that this court make findings of fact in the above entitled cause is denied, inasmuch as said cause came up on a bill of exceptions and this court has no jurisdiction to make findings of fact in matters so presented."

ERRORS ASSIGNED.

(Rec., 352-356.)

First. Said Supreme Court of the Territory of Hawaii erred in entering judgment in said cause reversing the judgment rendered in said cause by the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in favor of said appellant for the return of the property in controversy in said cause, or in case the same should not be returned, for the value thereof, found to be the sum of twenty-two thousand dollars ($22,000), and interest thereon, and sustaining the exceptions of said appellee in so far as they raised the question of election.

Second. Said Supreme Court of the Territory of Hawaii erred in not affirming in all things the judgment rendered in said cause by the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in favor of said appellant and against said appellee for the return of the property in controversy in said cause into the possession of said appellant and for the sum of one thousand forty-five dollars ($1,045) damages for the detention of said property, together with costs of suit taxed at the sum of fifty dollars and fifty cents ($50.50), or in the alternative, in case said property should not be so returned, for the value thereof, found and adjudged to be the sum of twenty-two thousand dollars ($22,000), and for the sum of one thousand and forty-five dollars ($1,045) damages for the detention thereof, together with the costs of suit taxed at the sum of fifty dollars and fifty cents ($50.50).

Third. Said Supreme Court of the Territory of Hawaii erred in sustaining the exceptions of said appellee, and each of them in said cause, in so far as such exceptions raised the question of an election by said appellant between inconsistent remedies or between inconsistent remedial rights.

Fourth. Said Supreme Court of the Territory of Hawaii erred in sustaining the twenty-second exception of said appellee to the finding of the Circuit Court in said cause, which said twenty-second exception is in the words and figures as follows, to wit:

"Immediately thereafter plaintiff proposed the following finding:

"That the contract of March 13, 1901, was an entire contract and intended so to be, for a lump sum consideration, which consideration was incapable of being apportioned so as to make possible the ascertainment of the price of the lienable and nonlienable items thereof; to which finding the defendant objected as follows:

"Defendant objects to the sixth proposed finding of fact upon the ground that said so-called finding contains mixed questions of law and fact, and upon the further ground that the evidence in said cause shows that the said contract of March 13, 1901, was not an entire contract nor intended so to be, but was a contract supplementary to the contract of February 21, 1900.

"The court then and there overruled said objection, to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant."

Fifth. Said Supreme Court of the Territory of Hawaii erred in sustaining the twenty-seventh exception of said appellee to the finding of said Circuit Court in said cause, which said twenty-seventh exception is in the words and figures as follows, to wit:

"Immediately thereafter plaintiff proposed the following finding:

"That plaintiff did not at any time intend to, nor did it in fact waive its title to the property sued for, nor did it intend to, or in fact make any election of remedies or rights so as to bar the bringing of this action; to which findings the defendant objected as follows:

"Defendant objects to the eleventh proposed finding of fact upon the ground that the same contains mixed questions of law and fact, and upon the further ground that the same is not supported by the evidence in said action.

"The court then and there overruled said objection, to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant."

Sixth. Said Supreme Court of the Territory of Hawaii erred in sustaining the twenty-eighth exception of said appellee to the finding of said Circuit Court in said cause, which said twenty-eighth exception is in the words and figures as follows, to wit:

"Immediately thereafter plaintiff proposed the following finding:

"That plaintiff did not intend to and did not in fact waive its title by bringing the action to enforce a material-man's lien against the Kona Sugar Company, Limited, and its receiver; to which finding the defendant objected as follows:

"Defendant objects to the twelfth proposed finding of fact upon the ground that the same is not supported by the evidence in said action.

"The court then and there overruled said objection, to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant."

Seventh. Said Supreme Court of the Territory of Hawaii erred in sustaining the fortieth exception of said appellee to the conclusion of law of said Circuit Court in said cause, which said fortieth exception is in the words and figures as follows, to wit:

"Immediately thereafter plaintiff proposed the following conclusion of law:

"That the contract of March 13, 1901, was an entire contract for a lump sum consideration and contained lienable and nonlienable items; to which conclusion the defendant objected as follows:

"Defendant objects to the sixth proposed conclusion of law upon the ground that the same is not supported by the evidence in said action, and is contrary to law.

"The court then and there overruled said objection, to which ruling of the court said defendant then and there duly excepted, and said ruling of the court is here and now assigned as error by said defendant."

Eighth. Said Supreme Court of the Territory of Hawaii erred in sustaining the forty-first exception of said appellee to the conclusion of law of said Circuit Court in said cause, which said forty-first exception is in the words and figures as follows, to wit:

"Immediately thereafter plaintiff proposed the following conclusion of law:

"That the plaintiff has made no election of either remedies or rights so as to bar the bringing and maintaining of this action; to which conclusion the defendant objected as follows:

"Defendant objects to the seventh proposed conclusion of law upon the ground that the same is not supported by any finding of fact herein, nor by the evidence in said action, and is contrary to law.

"The court then and there overruled said objection, to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant."

Ninth. Said Supreme Court of the Territory of Hawaii erred in ruling that said appellant was estopped from maintaining said action of replevin for the property in controversy in said cause, for the reason that said appellant had previously elected to pursue a remedy inconsistent therewith, namely, by bringing the action for the price of said property and to enforce a materialman's lien for the same.

Tenth. Said Supreme Court of the Territory of

Hawaii erred in ruling that by bringing the action to enforce a materialman's lien for the price of the property in controversy in said cause, said appellant made a binding election to waive performance of the condition precedent reserved to it in the contract of March 13, 1901, between said appellant and the Kona Sugar Company, Limited, in pursuance of which said property was delivered to said sugar company, namely, payment in full of the promissory note in controversy in said cause, and to treat the title to said property as in said the Kona Sugar Company, Limited, or the receiver thereof, such as to preclude said appellant from maintaining said action of replevin for the possession of said property.

Eleventh. Said Supreme Court of the Territory of Hawaii erred in holding and construing said conditional sale contract of March 13, 1901, in controversy in said cause, to be a severable contract and not an entire contract such as to prevent a severance of the price of the lienable items from the price of the nonlienable items of the property or materials in controversy in said cause.

Twelfth. Said Supreme Court of the Territory of Hawaii erred in not holding that said appellant had no right to maintain the materialman's lien proceedings, and that its attempt to exercise such nonexistent right was a mistake of remedy made in ignorance of its legal rights, and as such did not amount to an election between inconsistent remedies or remedial rights, such as to preclude said appellant from maintaining said action of replevin for the property in controversy in said cause.

Thirteenth. Said Supreme Court of the Territory of Hawaii erred in not holding that the special findings of fact by said Circuit Court were sufficient to sustain the said judgment of said Circuit Court.

Fourteenth. Said Supreme Court of the Territory of Hawaii erred in sustaining each and every of the exceptions of said appellee to the entering of said judgment by said Circuit Court in said cause which were sustained by the said Supreme Court.

Fifteenth. Said Supreme Court of the Territory of Hawaii erred in sustaining each and every of the exceptions of said appellee to the rulings of said Circuit Court in said cause which were sustained by said Supreme Court.

Sixteenth. Said Supreme Court of the Territory of Hawaii erred in denying the petition of said appellant for a rehearing in said cause."

While not waiving the specific assignment of errors, it is our judgment that all of the exceptions can be discussed under the "third," "tenth," "eleventh" and "twelfth" of the above assignments.

BRIEF.

I.

The findings of fact by the trial court were adopted by the Supreme Court of the Territory, though different legal conclusions were held to follow from such facts. This is equivalent to a special finding by the Supreme Court.

Stringfellow v. *Cain,* 99 U. S., 610.

Harrison v. *Perea,* 168 U. S., 311, 323, and cases there cited.

II.

Appeal and not writ of error was proper because of the provisions of the act of April 7, 1874 (18 Stat., 27).

Story v. *Black,* 119 U. S., 235.

Idaho & O. Improvement Co. v. *Bradbury,* 132 U. S., 509.

Gregory Consolidated Min. Co. v. *Starr,* 141 U. S., 222.

III.

The doctrine of election, whether on the common law or equity side of the court, depends not upon technical rules, but upon principles of equity and justice, and upon actual intention.

Watson v. *Watson,* 128 Mass., 152, 155.

Standard Oil Co. v. *Hawkins* (C. C. A., Seventh Circuit), 74 Fed., 395.

IV.

No rights of third parties are involved. The property was in the custody of a court of equity. The attorney said to have made the election was acting for other creditors who, with a creditors' committee and the approval of the court, were carrying on the business of the insolvent debtor. Replevin would have made these plans impossible. The attorney swears he had no intention of making an election, and the facts show he could not have had, if exercising sound judgment. In such a case the party is not held to an election.

Johnson-Brinkman Commission Co. v. *Mo. Pac. Ry. Co.,* 126 Mo., 344 (s. c., 47 Am. St. Rep., 675).

Wells v. *Robinson,* 13 Calif., 134.

In re Van Norman, 41 Minn., 494, 496.

Garrett v. *Farwell Co.,* 199 Ill., 436, 440, 441.

V.

In order that a person who is put to his election should be concluded by it two things are necessary:

First. A full knowledge of the nature of the inconsistent rights and of the necessity of electing between them.

Second. An intention to elect manifested, either expressly or by acts which imply choice and acquiesence.

Spread v. *Morgan,* 11 H. L. Cas., 588, 615.

VI.

Even where there are inconsistent rights the question of the conclusive effect of an election depends upon whether the rights of third parties have intervened. If so, the election is conclusive. If not, it is not conclusive.

Dickson v. *Patterson,* 160 U. S., 584, 592.

Campbell Printing Press Mfg. Co. v. *Rockaway Publishing Co.,* 56 N. J. L., 676.

Johnson-Brinkman Commission Co. v. *Mo. Pac. Ry. Co.,* 126 Mo., 344 (s. c., 47 Am. St. Rep., 681, 682).

Standard Oil Co. v. *Hawkins,* 74 Fed., 395.

The cases cited in the opinion of the court below and relied upon involved the rights of third parties taking without notice.

Lehman v. *Van Winkle,* 92 Ala., 443.

Van Winkle v. *Crowell,* 146 U. S., 42.

VII.

If the party does not in fact have two inconsistent rights, and merely attempts to assert a right he does not have, but supposes he has, and without obtaining any legal satisfaction therefrom, he is not precluded from asserting his actual right.

Snow v. *Alley,* 156 Mass., 193, 194, 195, and cases cited.

Watson v. *Watson,* 128 Mass., 152, 155.

Fuller-Warren Co. v. *Harter* (S. C. Wisc.), 53 L. R. A., 603, 606.

In re Norman, 41 Minn., 494, 496.

Garrett v. *Farwell,* 199 Ill., 436, 440, 441.

VIII.

Two such rights did not exist in the case at bar.

(*a*) The claim for lien (Rec., 246, 250, 251) was based upon a contract never in force between the parties, and which had been settled by the contract of March 13, 1901. (Rec., 153.)

(*b*) In Hawaii only the materials actually entering into the construction can be allowed in the lien; others delivered under the same contract, but not used, cannot be so embraced.

> Civil Laws Hawaii, Sec. 1741.
>
> *Allen & Robinson* v. *Redward,* 10 Haw., 151.

(*c*) The court found (Rec., 268) "that some of the property sued for in this action, including railroad rolling stock, was not in fact used in the construction of the railway of the Kona Sugar Company, Limited, and was not lienable."

This is in accord with the decisions of other courts.

> *Neilson* v. *Ia. Cent. Ry. Co.,* 51 Ia., 184.
>
> *New England Car Spring Co.* v. *Balti. & O. Ry. Co.,* 11 Md., 81.
>
> 20 Eng. & A. Enc. of Law (2nd Ed.), 290.
>
> 23 *id.,* 721.

(*d*) The court likewise found (Rec., 267) "that the contract of March 13, 1901, was an entire contract, and intended so to be, for a lump consideration, which consideration was incapable of being apportioned so as to make possible the ascertainment of the price of the lienable and nonlienable items thereof."

The earlier contract, which was settled and abrogated by the one of March 13, 1901, did not embrace the same quantity of material as the later one, and there was a difference in price of about $10,000. The rule therefore applies that where a contract is for a lump sum and contains lienable and nonlienable items, no lien can attach.

Phillips on Mechanic's Liens, Sec. 296.
Adler v. *World's Pastime Ex. Co.*, 126 Ill., 373.
Morrison v. *Minot*, 5 Allen, 403.
Graves v. *Bemis*, 8 Allen, 573.
Mulvey v. *Barron*, 11 Allen, 152.
Driscoll v. *Hill*, *id.*, 154.
Allen v. *Elwart*, 29 Ore., 428, 444.
Gelty v. *Ames*, 30 Ore., 573.
Whiting v. *Joslin*, 108 Mass., 103, 104.
First National Bank v. *Redman*, 57 Me., 405.

(*e*) It also appears that the Kona Sugar Company, Limited, did not own the land over which its right of way was supposed to extend, with the exception of two-thirds of a mile in a total of six miles laid with rails purchased of appellant. It had leases of some of the land not owned, and in one case only a verbal license. Under such circumstances the court below correctly found (Rec., 268) "that the acts of the plaintiff prior to the bringing of this action did not amount to a rescission of the contract of March 13, 1901, and said contract as a matter of fact has not been rescinded."

The facts therefore clearly bring the case within the authorities holding that where a person acts without a full knowledge, without intending to choose, in ignorance of material facts, and really without the right he supposes himself to possess, there is no election.

ARGUMENT.

The question in this case is narrowed to the single issue whether the assertion of a mechanic's lien in the receivership proceedings not prosecuted to judgment, under the circumstances here disclosed, was such an election of remedies as prevented the appellant from asserting the rights conferred by the conditional sale contract, and bringing replevin for the property therein described on the ground that the title thereto had never passed to the Kona Sugar Company, Limited.

It is to be remembered that no rights of innocent purchasers are here involved. No one, so far as the record discloses, has been misled by the failure of the appellant to assert its real rights at an earlier date, or by its claim to a lien in the receivership proceedings. It clearly appears from Mr. McClanahan's testimony that it was the hope and expectation of the committee representing the creditors and of Mr. McClanahan and his firm, representing many of them, that if the company should be permitted to market its sugar crop of that year (1902) it would be enabled to discharge its indebtedness and go on; that it was necessary that the railroad and its equipment remain in place to enable this to be done. (Rec., 96.) All these hopes were shown by subsequent events to be without foundation. That they were honestly entertained by the parties on the ground there seems no reason to doubt, as the arrangement of the committee received the approval of the court and of the officers of the debtor corporation. It is plain from Mr. McClanahan's testimony that in the course pursued he was acting quite as much or more for the other creditors represented by him, the committee of creditors and the court's plan, as for the appellant. In stating this we do not wish to be understood as imputing any wrong motive or improper conduct to Mr. McClanahan. We disclaim any such intention. We submit, however, that it is clearly apparent from his testimony that all parties in interest and the court entered upon a plan which would have been impossible if replevin had been brought and the property recovered under the contract, and that a client should not be bound by a technical election through the act of an attorney also representing other interests, taken with the purpose of carrying out a plan agreed upon by all parties in interest, including the debtor and the court, and without thought or intention of making an election between inconsistent remedies or the abandonment of any rights. And it seems to us that the fact that the attorney so alleged to have made an election was thousands of miles away from his client and not so situated as to permit conference with him directly is another reason why technical rules should not be applied.

At the outset, therefore, we wish to make it plain that we are not challenging the well known and generally accepted principle that a party having an election between two inconsistent remedies is bound by an election deliberately made and that suit brought upon one precludes a subsequent resort to the other claim. It is our contention that the facts remove this case from the operation of the general rule stated and bring it within certain clearly defined exceptions thereto.

It is to be noted that the Kona Sugar Company, Limited, had issued bonds prior to the contract of March 13, 1901. Such issue is referred to in the contract, in which it is stipulated that:

> "Upon such payment being made to us before the hour named, we will deliver to you the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting delivery, *upon the express condition and understanding that said rails, locomotives, cars, scales and other materials are and shall remain the property of William W. Bierce, Limited, until the full payment of the note above described, according to its terms."*

Mr. McClanahan says:

> "When we filled this lien there was a certain provision in this creditors' contract which provided for a priority of payment of claims and lien holders were preferred over certain other holders. We gave no thought whatever at the time of filing the lien as to whether it was a valid lien or whether it was an invalid lien. We have since learned it was absolutely a nullity and of no value whatever to Bierce & Co., the filing of this suit."

Under this state of facts is it equitable that the appellant should lose the material sold, for which it has never been paid, to other creditors who have in nowise been misled or induced to extend credit on the faith of the ownership of this property by the debtor corporation, and to a purchaser taking, as found by the court, with full knowledge of all the facts?

In *Watson* v. *Watson*, 128 Mass., 152, 155, the court, speaking by GRAY, C. J., said:

> "But the doctrine, whether applied in practice on the common law or on the equity side of the court, depends not upon technical rules, but upon principles of equity and justice, and upon actual intention. An election made in ignorance of material facts is, of course, not binding when no other person's rights have been affected thereby. So if a person, though knowing the facts, has acted in misapprehension of his legal rights, and in ignorance of his obligation to make an election, no intention to elect, and consequently no election, is to be presumed. This has been settled in England by a long series of authorities, of which it is sufficient to cite a few. *Pusey* v. *Desbouvrie,* 3 P. Wms., 315; *Wake* v. *Wake,* 1 Ves. Jr., 335; s. c., 3 Bro. Ch., 255; *Padbury* v. *Clark,* 2 Macn. & Gord., 298; s. c., 2 Hall & Tw., 341; *Spread* v. *Morgan,* 11 H. L. Cas., 588, 602, 611, 615. See also *Stratford* v. *Powell,* 1 Ball & Beatty, 1; *Briscoe* v. *Briscoe,* 1 Jon. & Lat., 334; s. c., 7 Irish Eq., 123; *Sweetman* v. *Sweetman,* I. R., 2 Eq., 141. In *Reed* v. *Dickerman,* 12 Pick., 146, 151, and in *Delay* v. *Vinal,* 1 Met., 57, 65, the rule was so stated, and not denied, but the facts did not call for its application."

This language was used with reference to an election to take a beneficial interest under a will and its effect upon the right of the beneficiary so taking to set up a right of his own, even if otherwise legal and well founded, which would defeat or in any way prevent the full effect and operation of the will. The rule is equally applicable to an election in courts between inconsistent remedies.

Knowledge is not to be imputed as a matter of legal obligation, as the doctrine of election is not properly a rule of positive law, but a rule of practice in equity.

Thus *In re* Van Norman, 41 Minn., 494, 496, the court said:

> "But none of the cases supposed are at all analogous to the case at bar, which is simply one where a party has made a fruitless attempt to assert a right which he never possessed, and, being beaten, has made full restitution and compensation for the wrong which he committed. The rule is as undoubted as it is familiar that, where a party has inconsistent rights or remedies, he may claim or resort to one or the other, at his election, and that when once made his election is irrevocable. But we think it is equally true that a mere attempt to pursue a remedy or claim a right to which a party is not entitled, and without obtaining any legal satisfaction therefrom, will not deprive him of the benefit of that which he had originally a right to resort to or claim; and this proposition, if sound, fully covers this case."

In *Garrett* v. *Farwell Co.*, 199 Ill., 436, 440, 441, the court said:

> "After that answer was filed no steps were taken in the case by appellant which in any way affected the rights of appellee and at the next term of court it was dismissed without prejudice. (*Flower* v. *Brumbach*, 131 Ill., 646; *Johnson-Brinkman Commission Co.* v. *Mo. Pac. Ry. Co.*, 126 Mo., 344; 47 Am. St. Rep., 675; *Equitable Co-operative Foundry Co.* v. *Hersee,* 33 Hun, 169.) In the latter case it was held that when the plaintiff had instituted a suit in affirmance of a contract, but had dismissed the same before judgment and before having derived any benefit therefrom, and which had inflicted no

injury upon the defendant, such action did not constitute an absolute election of inconsistent remedies, whereby plaintiff was afterwards precluded from prosecuting a new suit upon another and inconsistent remedy. In the Johnson-Brinkman Commission Company case it was held an attachment suit brought by a vendor of personal property against his vendee, if dismissed before final judgment, does not estop him from subsequently maintaining an action of replevin to recover the chattels, in the absence of any intervening rights, injury or change of position by reason of the attachment; and in the Flower case it was said (p. 651): 'The circumstances of a party having elected one of several remedies by action will not, in general, preclude him from abandoning such suit, and after having duly discontinued it he may adopt any other remedy.'

"The institution of a suit will not be held such a decisive act as to constitute a waiver of rights which would be inconsistent with the maintenance of such suit, (1) if the court in which the first action is brought has no jurisdiction to try the cause; (2) if the cause of action is prematurely brought and is defeated for that reason; (3) if the suitor has in his first action mistaken his remedy and is defeated on that ground; or (4) if an action is commenced in ignorance of material facts which proffer an alternative remedy, the knowledge of which is essential to an intelligent choice of procedure. 7 Ency. of Pl. & Pr., 365; *Enterprise Soap Works* v. *Sayers,* 51 Mo. App., 310; *New England Bank* v. *Lewis,* 8 Pick., 113; *Edgewood Distilling Co.* v. *Shannon,* 60 Ark., 133; *Bunch* v. *Grave,* 111 Ind., 351; *Smith* v. *Bricker,* 86 Iowa, 285; *Kingsbury* v. *Kettle,* 90 Mich., 476; *McLaughlin* v. *Austin,* 104 *id.,* 489; *In re* Van Norman, 41 Minn., 494; *Gould* v. *Blodgett,* 61 N. H., 115; *White* v. *Whiting,* 8 Daly, 23; *Bowdish* v. *Page,* 41 Hun, 170; *Wells* v. *Robinson,*

> 13 Cal., 133; *King* v. *Lagrange,* 50 *id.,* 328; *Mankin* v. *Mankin,* 91 Ia., 406; *McNutt* v. *Hilkins,* 80 Hun, 235."

In *Spread* v. *Morgan,* 11 H. L. Cas., 588, 615, Lord CHELMSFORD said:

> "In order that a person who is put to his election should be concluded by it two things are necessary. First, a full knowledge of the nature of the inconsistent rights and of the necessity of electing between them. Second, an intention to elect manifested, either expressly or by acts which imply choice and acquiescence."

In *Johnson-Brinkman Commission Co.* v. *Mo. Pac. Ry. Co.,* 126 Mo., 344 (s. c., 47 Am. St. Rep., 675), a vendor of personal property brought an attachment suit against his vendee, which he dismissed before final judgment, and then brought replevin. It was claimed that he had elected between inconsistent remedies and therefore could not maintain the latter action. As here, there were no intervening rights, injury or change of position of the parties by reason of the attachment. The case contains a full discussion and cites the conflicting decisions. The court holds (47 Am. St. Rep., 681-682):

> "The authorities which hold that a person having two inconsistent remedies and electing to pursue one cannot thereafter pursue the other do so upon the ground of election, or, as most courts put it, estoppel. As was said in *Anchor Milling Co.* v. *Walsh,* 20 Mo. App., 106: 'There is no element of estoppel in the case. There is no estoppel by record, for the attachment suit has not proceeded to judgment. There is no *estoppel in pais,* for the defendant has not taken such action in consequence of the suing out of the attachment that he will re-

> ceive detriment in a legal sense from the conduct of the plaintiff in changing his position and pursuing a different remedy.'
>
> "There were no intervening rights in this case from the time of suing out the attachment until that suit was dismissed, nor is it claimed that the defendant therein was by reason thereof induced to change his position with respect of the wheat in controversy. 'Estoppel *in pais* may be defined to be a right arising from acts, admissions or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged.' Bigelow on Estoppel, 4th Ed., 445.
>
> "The attachment suit was brought hastily and without time, as appears from the record, for the attorneys who brought it to investigate the facts in the case, who after having done so came to the conclusion that it was improvidently brought and dismissed it; and to hold, under such circumstances, that plaintiff is estopped by his election in that case from prosecuting this, in the absence of intervening rights, injury or change of position by anybody, by reason thereof, would be, we think, invoking a harsh and very unjust rule.
>
> "But, aside from any misconception as to the institution of the attachment suit, as it was dismissed before judgment, before the rights of others had intervened, and as the defendant therein was in no way injured in consequence thereof, we are not inclined to hold that plaintiff is, by reason of the institution of that suit, estopped from prosecuting this."

Among other cases cited as holding a different doctrine is *Lehman* v. *Van Winkle,* 92 Ala., 443, cited by this court in *Van Winkle* v. *Crowell,* 146 U. S., 42, 50-51. This court, however, had before it in that case the rights of third parties. The purchasers there had received the property, put it into use and mortgaged it to a third party before the vendor attempted to revest the title in himself through a conditional sale contract. Had there been no rights of third persons to consider, this court would not have reached the conclusion that the mere commencement of the attachment suit without consideration or intention to elect should, as between the vendor and vendee, nevertheless constitute an election. To so have held would have been to repudiate the great weight of authority that the question of election is one of equitable consideration.

This rule is also recognized in *Campbell Printing Press & Mfg. Co.* v. *Rockaway Publishing Co.,* 56 N. J. L., 676. In that case the trial court held that the institution of the action by the vendor for the purchase price was an election of his remedy and precluded him from bringing an action of replevin. This result was based upon the case of *Heller* v. *Elliott,* 44 N. J. L., 467, and *Leatherburg* v. *Connor,* 54 N. J. L., 172. The Appellate Court reviewed these two cases and showed that the rights of third persons had intervened in both instances, while in the Campbell case such was not the fact. The action of the lower court was therefore reversed.

An equivalent distinction was made in this court in *Dickson* v. *Patterson,* 160 U. S., 584, where the trial court dismissed a bill for an accounting and to set aside certain deeds as fraudulent on the ground that the complainant had elected to retain what he had received and to pursue his claim for moneys still due, and could not maintain a suit to set the whole transaction aside. This court reversed that action, holding that the complainant was not acquainted with all the facts and was not (p. 592) "for that reason—no rights of innocent third parties having intervened—to be denied the fullest relief to which according to the principles of equity he is entitled."

In the case at bar no conveyance was made by the debtor company of the property in question. No creditor obtained judgment or a levy upon the property. The whole property was in a court of equity for administration. The day when any creditor could obtain any advantage in the race of diligence had passed. A court of equity is not the place to obtain property through forfeitures or by the mistakes either of law or fact of persons having interests in or claims against the property in course of administration. Such a court never seeks to add to the fund by the application of technical rules or snap judgments.

This is well illustrated in *Standard Oil Co.* v. *Hawkins*, 74 Fed., 395 (C. C. A., Seventh Circuit), where a national bank received funds after it was insolvent and known to be so by its officers. These funds came to the hands of a receiver appointed by the comptroller of the currency. The defrauded depositor filed his claim as unpreferred. This was allowed, a certificate of proof issued to him and the various appropriate entries made in the books of the receiver and of the departmental officers at Washington. Out of the assets of the bank collected by the receiver a dividend was declared and a check for its share tendered this depositor. It then consulted counsel and learned for the first time that it might have reclaimed its deposit as fraudulently received. It declined the check, tendered back the certificate of proof and filed its bill to set aside its apparent election and to reclaim the amount of its deposit, etc. This right was sustained. The court said (p. 398):

> "Of course, the assertion by the appellant of a general claim against the bank was, in a sense, inconsistent with its assertion of right to pursue the proceeds of the drafts; and it cannot be allowed to shift its position, if the change would impose detriment, in a legal sense, upon the opposing party. It would then be estopped by its conduct. But if there be no estoppel, if no injury has resulted from the remedy pursued, to deny one the right to change position would be to say that a litigant must in the first instance, and at his peril, elect his remedy, and that he may thereafter pursue no other, although the law affords him a better one, which, through ignorance or misconception, he had failed to adopt, notwithstanding his opponent has suffered no detriment from the mistaken course pursued. We do not understand the law to justify so harsh a rule. If the appellant, in ignorance of its legal rights, believed no other course was available than to prove its debt as a general creditor; that it had no right, because of the fraud of the bank, to retake from the receiver the proceeds of the paper tortiously obtained by the bank, the avails of which had come into possession of the receiver,—and in such belief proved its claim as a general creditor,—equity ought to permit the withdrawal of such claim and the pursuit of an appropriate remedy, adequate under the circumstances to restore its property, unless the action of the appellant has wrought a change in the position of affairs, working legal detriment, that would render it inequitable for the appellant to pursue now a different course. We understand this to be the rule established,

whether the mistake may be deemed a mistake of law or a mistake of fact. Pom. Eq. Jur., Sec. 512; *Wells* v. *Robinson,* 13 Calif., 134; *Ward* v. *Ward,* 134 Ill., 417; *Becker* v. *Walworth,* 45 Ohio St., 173; *Johnson-Brinkman Commission Co.* v. *Central Bank of Kansas City,* 116 Mo., 558; *Nysewander* v. *Lowman,* 124 Ind., 584; *In re* Woodburn's Estate, Appeal of McMannis, 138 Pa. St., 606; *Macknet* v. *Macknet,* 29 N. J. Eq., 54; *Dunham* v. *Ewen* (N. J. Ch.), 15 Atl., 245."

(Pp. 399-400):

"The receiver is a trustee holding these funds for distribution among the creditors of the bank according to their respective rights. He is an officer of the law. Equity will not permit a trustee to avail himself, as against a *cestui que trust,* of a mistake of law on the part of the latter, when it is possible to correct the error without injury to the trust estate. Here, it is true, the specific money of the appellant is no longer in the hands of the receiver. It has been distributed by him, in the proper discharge of his duty, among the creditors; but as the property of the appellant was erroneously, although through no fault of the receiver, appropriated to the benefit of the general creditors, there is no injustice in a restoration, if assets remain out of which indemnification can be had. The general creditor will receive not a penny less than is his due. The appellant, if the remaining assets prove sufficient and availing, will receive that to which it is entitled and no more. There has been an erroneous diversion of the fund,—caused, it is true, by the act of the appellant. If legal injury has resulted from the act the appellant cannot be afforded relief, but it has not so resulted, and the general creditor will, by the granting of relief to appellant, be put in no worse plight than before the act. Restoration

> for diversion of funds, whether from design or through mere error, is not to be denied unless the diversion has occurred through the wrong or error of the party seeking restoration, and when, in the case of error, there has been wrought legal detriment to the opposing right. This is certainly true with respect to trustees and officers of the law who are not permitted to assert a mere mistake of law as an excuse for the denial of justice and who are required to act as any high-minded man would act under the like circumstances. In *Ex parte* James, *In re* Condon, 9 Ch. App., 609, a creditor had obtained judgment and issued execution, which was levied by the sheriff upon certain personal property of the defendant, and upon its sale the proceeds were paid to the judgment creditor. Thereafter, the debtor being adjudicated a bankrupt, the assignee demanded the proceeds of the sale. The judgment creditor, supposing the assignee entitled thereto, paid over the same to him. Being afterwards advised that he had a right to retain the money, the creditor filed a petition against the trustee for restoration, and restoration was decreed. The court observed: 'That a trustee in bankruptcy is an officer of the court. He has inquisitorial powers given him by the court, and the court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among creditors. The court, then, finding that he had money in his hands which, in equity, belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion, a court of bankruptcy ought to be as honest as other people.' "

This case cites many additional cases, and concludes (p. 402):

> "Here the receiver is an officer of the law, having the assets in *custodia legis*. He has no

> interest in the fund, save to see that it shall be distributed among those entitled to it according to the highest principles of honesty and equity."
>
> * * *
>
> "The creditors have received that to which they were not entitled, and that which belonged to the appellant. If restitution be made out of the assets still remaining, the creditors will receive no less than that to which they were originally entitled, and the appellant will only receive that which was its due. To compass such a result is the highest equity, since otherwise the appellant will be deprived of its own, and the general creditors will receive that to which they have no right. The decree sustaining the demurrer and dismissing the bill for want of equity will be reversed, and the cause remanded for further proceedings according to law."

In the case at bar the court found (Rec., 268):

> "That some of the property sued for in this action, including railroad rolling stock, was not, in fact, used in the construction of the railway of the Kona Sugar Company, Limited, and was not lienable."

It also found that appellant did not at any time, in intention or in fact, waive its title to the property sued for, nor did it, in intention or in fact, make any election of remedies or rights. (Rec., 268; Findings, 11, 12, 13.)

It also appears that the Kona Sugar Company, Limited, did not own the land across which the railroad was constructed, and in the construction of which a part of the material purchased from appellant was used. It leased a part of the right of way, and across one piece had no lease. It owned in fee only about two-thirds of a mile of the total of six miles constructed with the rails of the appellant.

(Rec., 88-93.) It, therefore, appears that little, if any, of the property was lienable. The rolling stock and most of the mileage was not lienable.

It will not be contended, we assume, that the rolling stock and some of the other materials of the contract, *e. g.*, the Howe scales, *were furnished to be used* in the construction of a railroad. *Neilson* v. *Iowa Central Railway Co.*, 51 Ia., 184; *New England Car Spring Co.* v. *Baltimore, etc., Ry. Co.*, 11 Md., 81; s. c., 69 Am. Dec., 181; 20 Ency. of Law, (2d ed.), 290; 23 *id.* 721.

We therefore contend that plaintiff's lien suit was in fact unavailable, for the law is that where a contract is for a lumping sum and contains lienable and non-lienable items, no lien can attach. Phillips on Mechanics' Liens, Sec. 296; *Adler* v. *World's Pastime Ex. Co.*, 126 Ill., 373; *Morrison* v. *Minot*, 5 Allen, 403; *Graves* v. *Bemis*, 8 Allen, 573; *Mulrey* v. *Barron*, 11 Allen, 152; *Driscoll* v. *Hill*, 11 Allen, 154; *Allen* v. *Elwart*, 29 Ore., 428, 444; *Getty* v. *Ames*, 30 Ore., 573; *Whitney* v. *Joslin*, 108 Mass., 103, 104; *Lambord* v. *Pike*, 33 Me., 141, 144; *First Natl. Bank* v. *Redman*, 57 Me., 405.

These cases are all directly in point and all lay down the rule before cited, which we believe to be undisputed law. The contract, being entire, cannot be apportioned and enforced in fragments, and as no lien is given for a *part* of the materials furnished and the price is a lumping sum, it is obviously impossible to enforce a lien as to any part of it.

The Hawaiian statute as to liens is very much like those in the cases cited (Civil Laws, Sec. 1741).

It provides for a lien for labor or material to be used

> "in the construction or repair * * * of any railroad * * *," and the lien is to exist "for the price agreed to be paid for such labor or material."

In the case at bar the rails were undoubtedly used in the construction of the road, but as it is impossible to designate "the price agreed to be paid" for such rails, it is clearly impossible, under the cases cited, to enforce a lien on the said rails.

It is equally clear that in this case certain of the articles furnished were not used "in the construction of the railroad," such as the splice bars, some of the spikes, sixteen cane cars, two locomotives, a rail bender, four track gaugers, two jacks, one track scale, and some other small articles. (Rec., 74.) Some of these articles, such as the rolling stock, *could not* have been used in the construction of the road. *Texas R. R. Co.* v. *Allen* (Texas), 4 Am. Dig. Col., 2115; *Gordon Hardware Co.* v. *S. P. R. R. Co.,* 22 Pac., 406, 407; *Neilson* v. *Ia. Ry. Co.,* 51 Ia., 184; *Central Trust Co.* v. *Texas, etc.,* 23 Fed., 703, 704.

Other material furnished was not, in fact, used, but was put aside and never made any use of. (Rec., 74.)

It is the settled law in Hawaii that

> "A material man is not entitled to a lien for material which, though furnished to a contractor for a building, never was incorporated into the building, but was delivered at the contractor's shop and by him disposed of for his own benefit." *Allen & Robinson* v. *Redward,* 10 Haw., 151.

The claim of the court, in its first opinion, that the contract of February 21, 1900, could have been referred to to ascertain the price at which the materials were sold, seems plainly untenable. The record shows that there were 188 tons of rails embraced in the first contract, not embraced in the second. It is clear the first contract was wholly abandoned and the contract of March 13, 1901, substituted therefor. There had been no delivery under the first, and there could be none, because the Kona Sugar Company could not make the payments required by the contract.

The price under the first contract for the goods actually delivered amounted to $36,252.80, while the price under the contract of March 13, 1901, was $47,044.53. The difference, $10,791.73, cannot be accounted for upon any other hypothesis than an entirely new agreement as to price, based upon, as we must assume, the fact of deferred payments and the wear and tear to which the merchandise would be subjected, and consequent depreciation prior to payment. It would be utterly impossible to apportion this increased price among the lienable articles.

The court will observe that the notice of material man's lien, and the proceedings to enforce the same, were based upon the contract of February 21, 1900 (Rec., 246, 250, 251, 258), which had been entirely superseded by the contract of March 13, 1901. In fact, the latter contract expressly declares that it is

> "in settlement of the contract between the Kona Sugar Company, Limited, and William W. Bierce, Limited, as evidenced by letter dated February 21, 1900, and accepted by the Kona Sugar Company, Limited, February 22, 1900."

It is idle to claim that a notice and claim for mechanics' lien upon a contract that no longer had any existence was effective to defeat remedies under a subsequent contract in nowise referred to in the proceedings. At least, it is clear that the person handling this matter for appellant had such a misconception of the facts and legal rights of the parties as to come within the principles of the cases above cited. To constitute an election there should be a knowledge of facts and a clear choice between rights, elements absent from the present case, for the action claimed to have constituted an election was based upon a contract which had no existence, the price or description of the materials could not be ascertained, and the use to which most of them had been put, and the ownership of the land over which the road was constructed precluded a lien. It is not believable that any sane person would have made such an election with knowledge of these facts, and the action can only be accounted for upon the theory that the Bierce attorneys, representing the other creditors and co-operating with the creditors' committee and the court, in a plan which required that the railroad remain, made no election for the Bierce Company. The case is clearly within the principle announced in *Wells* v. *Robinson,* 13 Cal., 134, where a party brought suit to recover judgment against an administrator for money embezzled by the intestate, pending which he filed a bill in equity to recover the property bought with the money. The suit at law was prosecuted to a judgment, and later a decree in the equity suit was taken out. The party in question apparently did not know the state of the funds of the estate. The court, in discussing the subject, says:

> "Upon such a subject (election) no general rule can be laid down; but every case must be left to be decided on its own particular circumstances rather than upon any definite abstract doctrine. Before any presumption of an election can arise it is necessary to show that the party acting or acquiescing was cognizant of his rights. When this is ascertained affirmatively, it may be further necessary to consider whether a party intended an election. * * * We think the suit brought evidence of no such distinct and deliberate choice * * * as to bar the plaintiffs from prosecuting their equitable claim."
>
> "It would be unreasonable to suppose that they intended to surrender a claim on a specific fund * * * for a judgment against the administrator which would give them no better right to participate in this fund than the rest of the creditors."

Under these circumstances it is contended that, although there are no rights of innocent third parties to be here considered (Hutchins, the purchaser, having full written notice), the rule that a person cannot have the benefit of two inconsistent remedies or causes of action is applicable, and because these attorneys chose to file a notice of lien and commence a lien suit, their clients must lose title to their property without payment. The statement assumes too much. There must be two remedies. This means real remedies, not imaginary ones. The contention of the appellee and the law upon this subject are well stated in *Fuller-Warren Co.* v. *Harter* (S. C. Wis.), 53 L. R. A., 603, 606:

"Does that rule apply where a person, supposing he has two causes of action for the satisfaction of his claim, when in fact he has but one, sues upon the supposed cause which has no existence, and is defeated on that ground? Is he, under such circumstances, precluded from suing upon the only cause of action which he, in fact, had?" * * * "That seems to be unreasonable. If the doctrine as to the effect of an election between two inconsistent causes of action goes that far, it is certainly liable to cause great injustice in some cases. That, of itself, without investigation, suggests that it does not go that far. We should hesitate to sustain counsel's theory if the question involved was new, but it is not.

"The same seemingly unreasonable application of the rule, as regards the effect of an election between inconsistent remedies, as that contended for here, has been several times insisted upon in other courts, as appears from reported cases, and always unsuccessfully. In *Morris* v. *Rexford,* 18 N. Y., 552, the circumstances were that plaintiff sold a quantity of oats to the defendant, payment therefor to be made on delivery. The delivery was made but the purchase price was not paid. After some delay the plaintiff endeavored to rescind the sale contract and brought replevin. Subsequently he sued for the purchase price of the oats. On the trial it did not appear that recovery was had in the replevin action or what had become of the same. The court held that the mere commencement of the replevin action did not necessarily preclude plaintiff from prosecuting the action on the sale contract; that whether there was an election of remedies within the meaning of the rule on that subject depended upon whether the plaintiff had in fact two remedies; that if he had but one, the pursuit of one that he did not possess would not bar him from subsequently resorting to the one which he did possess. In *Kinney* v. *Kiernan*, 49 N. Y., 164, the court stated the rule in these words: 'The institution by a party of a fruitless action, which he has not the right to maintain, will not preclude him from asserting the rights he really possesses.' In *McNutt* v. *Hilkins,* 80 Hun, 235; 29 N. Y. Supp., 1047, the decision was based on that in the preceding case cited. The rule declared substantially fits the exact facts of this case. The syllabus states it briefly, as follows: 'An action brought for the conversion of personal property, wherein it was successfully maintained by the defendant that the title to the personal property alleged to have been converted was in him, and in which judgment was rendered in his favor, is not a bar to a subsequent action between the same parties brought to recover damages for a breach of the contract of sale of such property.' In reaching such conclusion the court used the following language as to the contention of the losing party: 'The defendants, by their contention, succeeded in establishing that there had been an absolute sale, and that, therefore, the plaintiff had mistaken her remedy, and they cannot now set up the judgment which they then obtained to prevent the plaintiff recovering the purchase price of the property which they formerly urged and established was sold to them by her, and which it is conceded they have not paid for, and thus not only retain the property, but also the purchase price.' To the same effect are *Re Van Norman,* 41 Minn., 494; *Gould* v. *Blodgett,* 61 N. H., 115.

"In applying the rule as regards the effect of a choice between two inconsistent remedies or causes of action, it must be kept in mind that there must be two such remedies or causes of action, in fact, before a choice can be made within the meaning of the rule. A misconception of remedies should not be mistaken for an election between inconsistent remedies."

In *Snow* v. *Alley,* 156 Mass., 193, 194, 195, the court (HOLMES, J.) said:

> "But, apart from this answer, the defendant's argument rests on a misapprehension of the nature of election. Election exists when a party has two alternative and inconsistent rights, and it is determined by a manifestation of choice. *Metcalf* v. *Williams,* 144 Mass., 452, 454. But the fact that a party wrongly supposes that he has two such rights, and attempts to choose the one to which he is not entitled, is not enough to prevent his exercising the other, if he is entitled to that. There would be no sense or principle in such a rule. *Butler* v. *Hildreth,* 5 Met., 49, 52; *Snow* v. *Alley,* 144 Mass., 546, 554, 560; *Whiteside* v. *Brawley,* 152 Mass., 133, 135; *Morris* v. *Rexford,* 18 N. Y., 552, 557."

So, in *Butler* v. *Hildreth,* 5 Met., 49, 51, that court (SHAW, C. J.) said, immediately after the quotation made therefrom in the opinion of the court, overruling the petition for a rehearing in the case at bar:

> "But this determination will not extend to a case where facts subsequently come to the knowledge of the assignee, which, if he had known them before, would have led him to a different election—whether these facts relate to the character of the sale, and bear upon the question whether it was fraudulent or not, or whether they relate to the remedy. As if the assignee, on commencing his action for the price, believes that he has secured the amount due, by a valid attachment of the defendant's property, and afterwards discovers that it is not the property of the defendant, and that his supposed remedy has failed. Or, if he should discover that the defendant had an offset, which would be good against an action of trover."

It is true that many cases can be found where broad statements are made inconsistent with this view, *e. g.*, *Hickman* v. *Richburg*, 122 Ala., 638, and the cases there cited. In that case, and all others well considered, the rights of innocent third parties were involved. There is no reason for such a rule as between the parties to the original transaction, or those claiming under them with notice. To apply such a rule as between the parties is to work great hardship, *e. g.*, suppose A sells a piano to B, reserving title in himself until payment is made. Hearing that B is about to leave the state, he brings attachment proceedings and seizes the piano. Learning that B, in fact, had not intended to leave the state, and would claim all the property in his possession, including the piano, as exempt under the law, he dismisses his attachment and brings replevin for the piano. Is there any reason why he should be bound by his so-called "election," and thereby B acquire title to the piano without cost?

It was contended in the court below that the contract of March 13, 1901, was not a conditional sale contract, but at most constituted only a mortgage. In view of this contention, it seems proper to discuss this question at this place. If the agreement was a mortgage, there was no title reserved in the plaintiff below on which he could maintain replevin against anyone, while if the sale was conditional and title was retained until the performance of the condition, the condition not having been performed, it follows as a matter of law that the defendant obtained no title to the property at the receiver's sale, and this action was properly brought.

The intent of the parties being a prime element to be considered in the interpretation of contracts, it will not be inappropriate to state at this time that there is nothing in the agreement of March 13, 1901, under which the property in controversy was delivered to the Kona Sugar Company, Limited, to warrant the assumption or inference that either party to said agreement intended that the property in controversy should become an integral part of the plantation, or that it should come under the mortgage, prior to the performance of the condition precedent stipulated in the agreement to the passing of the title to the Kona Sugar Company, Limited, namely, the payment of the note "according to its terms." The agreement in terms expressly negatives the idea that any such intention was entertained by either party. Even if this were not true, the question of intent is, in fact, foreclosed by the express findings of the trial court, as follows, to wit:

> Finding 5. "That the condition precedent, the performance of which was to divest the plaintiff of title to the property sued for, was intended by the parties to be the payment of the note of $37,044.53, given in settlement of the contract of February 21, 1900."
>
> 8th. "That both the plaintiff, and the Kona Sugar Company, Limited, intended said contract of March 13, 1901, to operate as a conditional sale of the property sued for, and not as a chattel mortgage, or an absolute sale, with a lien reserved to the vendor."
>
> 9th. "That in view of all the circumstances of the case, said contract of March 13, 1901, was a conditional sale and not a chattel mortgage or absolute sale with lien reserved in the vendor."

We take it to be established by these findings, based upon the evidence before the court, that it was the intention of the plaintiff, and also of the Kona Sugar Company, Limited, that the title to the property should be retained in the plaintiff until the note was paid, and that the payment of the note was a condition precedent to the passing of the title to the Kona Sugar Company, Limited.

This brings us to the question whether the parties so expressed their intention in the agreement as to justify the trial court in announcing, as a conclusion of law, that the agreement was a conditional sale, and not a chattel mortgage.

The third conclusion of law announced by the trial court is as follows:

> "That the contract of March 13, 1901, between plaintiff and the Kona Sugar Company, Limited, was a conditional sale and not a chattel mortgage or absolute sale with lien reserved by the plaintiff, and under which plaintiff has title to the property sued for."

The courts of a few of the states have expressed their disapproval of contracts of conditional sale on principle, and have exhibited a disposition to adopt slight pretexts for construing them to be absolute sales, and void as to innocent parties and creditors without notice unless acknowledged and recorded, as required of chattel mortgages. As instances of such courts, we may cite those of Pennsylvania, Illinois, Colorado and Montana. A few other states have by statute accomplished the same object, notably Iowa, Maine, Vermont, Kentucky and Texas. However, this court and the great majority of the courts of the American states and territories, as well as the courts of England, have declared in favor of conditional sales of personal property, where the parties have expressed their intention to make them, and the transaction is free from fraud. One of the leading cases on this subject is that of *Harkness* v. *Russell,* 118 U. S., 663. The agreement under consideration in that case, as set out in the last paragraph of the syllabi, is as follows:

> "A, having agreed to sell certain personal property to B, on the performance of the conditions on his part, delivered it to him, and took from him a promissory note stating the following as the condition of the sale: 'The express condition of this transaction is such that the title, ownership or possession of said property does not pass from the said A until this note and interest shall have been paid in full, and the said A has full power to declare this note due and take possession of said engine and saw-mill when he may deem himself insecure, even before the maturity of this note. In case said property shall be taken back, A may sell the same at public or private sale, without notice, or he may, without sale, endorse the true value of the property on this note, and I agree to pay on the note any balance due thereon after such endorsement, as damage and rental for said machinery.' B entered into possession, and, without performing the conditions of sale, sold the property to C, who knew that it had not been paid for, and that A claimed title to it. At the time of the sale to C, the value of the property was less than the amount due on the note. In an action against C to recover the value of the property, *Held,* that this transaction was not a mortgage, but was an executory conditional sale; and, being free from fraud, that it was valid."

The court said in its opinion (pp. 666, 667, 668):

> "The first question to be considered is, whether the transaction in question was a conditional sale or a mortgage; that is, whether it was a mere agreement to sell upon a condition to be performed, or an absolute sale, with a reservation of a lien or mortgage to secure the purchase money. If it was the latter, it is conceded that the lien or mortgage was void as against third persons, because not verified by affidavit and not recorded as required by the law of Idaho. But, so far as words and the express intent of the parties can go, it is perfectly evident that it was not an absolute sale, but only an agreement to sell upon condition that the purchasers should pay their notes at maturity. The language is: 'The express condition of this transaction is such that the title * * * does not pass * * * until this note and interest shall have been paid in full.' If the vendees should fail in this, or if the vendors should deem themselves insecure before the maturity of the notes, the latter were authorized to repossess themselves of the machinery, and credit the then value of it, or the proceeds of it if they should sell it, upon the unpaid notes. If this did not pay the notes, the balance was still to be paid by the makers by way of 'damages and rental for said machinery.' This stipulation was strictly in accordance with the rule of damages in such cases. Upon the agreement to sell, if the purchaser fails to execute his contract, the true measure of damages for its breach is the difference between the price of the goods agreed on and their value at the time of the breach or trial, which may fairly be stipulated to be the price they bring on a resale. It cannot be said, therefore, that the stipulations of the contract were inconsistent with, or repugnant to, what the parties declared their intention to be, namely, to make an executory and conditional contract of sale. Such contracts are well

known in the law and often recognized; and, when free from any fraudulent intent, are not repugnant to any principle of justice or equity, even though possession of the property be given to the proposed purchaser. The rule is formulated in the text-books and in many adjudged cases. In Lord Blackburn's Treatise on the Contract of Sale, published forty years ago, two rules are laid down as established: (1) That where by the agreement the vendor is to do anything to the goods before delivery, it is a condition precedent to the vesting of the property. (2) That where anything remains to be done to the goods for ascertaining the price, such as weighing, testing, etc., this is a condition precedent to the transfer of the property. Blackburn on Sales, 152. And it is subsequently added, that 'the parties may indicate an intention, by their agreement, to make any condition precedent to the vesting of the property, and if they do so, their intention is fulfilled.' Blackburn on Sales, 167. Mr. Benjamin, in his Treatise on Sales of Personal Property, adds to the two formulated rules of Lord Blackburn, a third rule, which is supported by many authorities, to wit: (3) 'Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.' Benjamin on Sales, 2d Ed., p. 236; 3d. Ed., Sec. 320. The author cites for this proposition, *Bishop* v. *Shillito,* 2 B. & Ald., 329, note (a); *Brandt* v. *Bowldy,* 2 Barn. & Adolph, 932; *Barrow* v. *Coles* (Lord Ellenborough), 3 Campbell, 92; *Swain* v. *Shepherd* (Baron Parke), 1 Mood. & Rob., 223; *Mires* v. *Solebay,* 2 Mod., 243."

The conclusions of the court, after an exhaustive review of the authorities, both of England and of the several states of this country, was:

> "That it is established by overwhelming authority that, in the absence of fraud, an agreement for a conditional sale is good and valid, as well against third persons as against the parties to the transaction, and that a bailee of personal property cannot convey the title, or subject it to execution for his own debts, until the condition, on which the agreement to sell was made, has been performed."

The same court said, in *Segrist* v. *Crabtree,* 131 U. S., 287, 292:

> "In *Harkness* v. *Russell,* 118 U. S., 663, 668, this court, after a full examination of the adjudged cases, recognized the general rule—at least as between the original parties to a conditional sale, and where the subject is not controlled by local statutes—to be as stated by Mr. Benjamin in his treatise on sales of personal property, namely: 'Where the buyer is by contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.'"

The case of *Harkness* v. *Russell, supra,* is cited as controlling authority, and followed in many cases, among which may be mentioned *Black Diamond Coal Mining Co.* v. *The H. C. Grady* (Strong, intervenor), 87 Fed., 232, 234; *McRae* v. *Merrifield,* 48 Ark., 160, 162; *Van Allen* v. *Francis et al.,* 123 Cal., 474, 478; *W. W. Kimball Co.* v. *Mellon,* 80 Wis., 133, 145; *Palmer* v. *Howard,* 72 Cal., 293, 295; *Rodgers* v. *Bachman,* 109 Cal., 552, 556; *Dodd* v. *Bowles,* 3

Wash. Ter., 383, 387; *Implement Co.* v. *Parlin & Co.,* 51 Kan., 544, 546; *Schneider* v. *Lee,* 33 Ore., 578, 582; *De Saint Germain* v. *Wind,* 3 Wash. Ter., 189, 193; *Manufacturing Co.* v. *Graham,* 8 Ore., 17; *Rosden* v. *Baker,* 8 Ore., 240; *Wadleigh* v. *Buckingham,* 80 Wis., 230, 236; *Kellogg* v. *Burr,* 126 Cal., 38; *Standard S. L.* v. *Dole,* 20 Utah, 469; *The John K. Shaw,* 32 Fed. R., 491, 496; *Warren* v. *Liddell,* 110 Ala., 245, 248; *Redewill* v. *Gillen,* 4 N. Mex., 78, 84; *New Haven Wire Co. Cases,* 57 Conn., 352, 386; 5 L. R. A., 307; *Hirsch* v. *Steele,* 10 Utah, 20; *McManus* v. *Wolters,* 61 Pac., 686.

The same doctrine is thus stated in 6 Am. & Eng. Enc. of Law (2d Ed.), 440, 441:

> "Sales of personal property on condition that title is not to vest in the purchaser until the payment of the purchase money, or upon some other condition, are of very frequent occurrence, and the validity of such sales as between the parties thereto is unquestioned."
>
> "In most jurisdictions, in the absence of fraud, the rule is the same as to third persons, though in some states it is held otherwise, and in a number of states all conditional sales must be recorded in order to be valid as against third persons without notice."

This requirement of recording is entirely statutory and is not to be found in any of the statutes of the Territory of Hawaii.

In the same work (6 Am. & Eng. Enc. of Law, 2d Ed.), 481, it is said:

> "The vendor of property sold upon conditions precedent may recover it from a third person who has acquired possession from the vendee before the performance of the condition, al-

> though such person may have been ignorant of the vendor's claim."
>
> "In several states, however, the contract of sale is required to be recorded in order to enable the vendor to enforce his claim against third persons without notice."

It will be noted that in the Harkness case, as in the case at bar, a promissory note was given, and it was provided that the title to the property should not pass till the note was paid.

It is settled law that the giving of a note does not make the sale an absolute one. See, among other cases: *Crawdour* v. *Robertson,* 9 Ch. Div., 419; *Herring* v. *Hoppock,* 15 N. Y., 409; *Call* v. *Seymour,* 40 Ohio State, 670; *Pettyplace* v. *Manufacturing Co.,* 103 Mich., 155; *Hollenburg Music Co.* v. *Morris,* 35 S. W., 396; *Thomason* v. *Lewis,* 103 Ala., 426; *McPherson* v. *Acme Lumber Co.,* 70 Miss., 649; *Duke* v. *Shackelford,* 56 Miss., 552; *Van Allen* v. *Francis,* 23 Cal., 474; *Kirby* v. *Tompkins,* 48 Ark., 273; *Levan* v. *Wilten,* 135 Pa. St., 61.

Nor did taking the bonds as collateral to the note change the conditional sale into an absolute one. See: *Hollenburg Music Co.* v. *Morris,* 35 S. W., 396; *Cherry* v. *Arthur,* 5 Wash., 787 (32 Pac., 744); *Page* v. *Edmunds,* 64 Vt., 124; *Matthews* v. *Lucia,* 55 Vt., 308; *Clark* v. *Hayward,* 51 Vt., 14; *Chile* v. *Allen,* 33 Vt., 476; *Pettyplace* v. *Manufacturing Co.,* 103 Mich., 155; *Electric Co.* v. *Norris,* 59 N. W., 151; *Standard S. L.* v. *Dole,* 20 Utah, 469; *Sergeant* v. *Metcalf,* 5 Gray (Mass.), 306; *Dodd et al.* v. *Bowles,* 3 Wash. T., 383; *Lippincott* v. *Rich,* 56 Pac., 806.

The case of *Cherry* v. *Arthur, supra,* is exactly in point on the proposition that taking additional security does not change a conditional sale to an absolute one.

Arthur delivered to Sherman a planer under a condition-sale contract, which the court says "was effectual to retain the title in appellant as between him and Sherman. *De Saint Germain* v. *Wind,* 3 Wash. T., 189 (13 Pac. Rep., 753); *Dodd* v. *Bowles,* 3 Wash. Ter., 383 (19 Pac. Rep., 156). Whether it were fastened to the building or not, so long as it did not become a part of the realty." Sherman mortgaged the planer with the sawmill and certain real estate to Cherry and Parkes, who filed a bill to foreclose the mortgage. The court held that the planer did not pass under the mortgage.

A part of the opinion is as follows:

> "But a point is made that the appellant had taken other security for the unconditional payment of the price of the planer, and that for that reason the sale should be held to become absolute. The price of the planer was $800, one-half of which was to be paid in cash, the conditional sale notes, under which the possession of the machine was claimed, covering the remainder. No cash was paid, but considerable time was conceded. When that time had expired, appellant took from Sherman a mortgage of real estate to secure the cash payment on the planer and certain other indebtedness then due. There was no pretense of any settlement between appellant and Sherman, and no agreement to surrender the conditional sale notes. Under these facts we see no reason for disturbing the contract between the parties.

In *Page* v. *Edwards,* 64 Vt., 124, the mortgage taken by the vendor was on other property than the waterwheel and machinery in controversy and this mortgage was foreclosed, and yet it was held that neither the taking of the mortgage nor its foreclosure made the sale absolute. There was a mortgage on the mill prior to the conditional sale made, which prior mortgage, it was held, did not cover the waterwheel and machinery subsequently sold.

The court said (p. 132):

> "It is further claimed that the vendors waived their lien by taking their mortgage. If such a lien comes within the category of liens waivable in that way, it is manifest that this lien was not waived; for the report finds that the mortgage was taken as further security, which rebuts the presumption of a waiver, as it shows an intention not to waive; and whether waiver or not is matter of intention.
>
> "There is no ground for the claim that the foreclosure of that mortgage was a satisfaction of the lien, as the report finds that over $400 remained due after applying the value of the property obtained by the foreclosure aside from this machinery."

In the case of *Pettyplace* v. *Manufacturing Co., supra,* in a conditional sale upon the delivery of the property, four notes were given for the purchase price, in each of which it was stated that the express conditions of the transfer of the possession of the property were such that the title of the property did not pass from the vendor until the notes were paid in full. The fourth note was secured by a real estate mortgage executed by one of the purchasers. The mortgagor alone signed the fourth note and mortgage, and, in company with one of his covendees, took possession of the property (an engine and separator) and used the same for two years, when he sold his one-third interest therein. The suit was by the purchaser of said interest sold against the vendor (who had seized the property) to recover the value of said interest.

It was claimed, among other things, that the giving of the mortgage made the sale absolute.

The court said (pp. 159, 160):

> "It is conceded that the title to personal property sold may be retained by the seller, and that a note may be taken for the price, and the sale will still be conditional; but it is claimed that, if other or collateral security be taken, then the sale becomes absolute. This is not the rule. It was held, in *Peninsular General Electric Light Co.* v. *Norris,* 100 Mich., 496, that a mechanic's lien could be enforced notwithstanding the title was held by the vendor. In *Manufacturing Co.* v. *Smith,* 40 Fed. Rep., 339, it was said:
>
> " 'Instead of being inconsistent, it was merely additional security to that provided by the statute. It certainly does not establish, as matter of law, that, in thus retaining title to the machinery, complainant has waived its statutory lien upon the lot of ground or premises on which the machinery was placed.'
>
> "In *Fuller* v. *Byrne,* 102 Mich., 461, a stipulation was inserted in the contract which provided that the property 'is and shall remain the property of Estey & Camp until each and every of said amounts, and interest thereon, and any judgment rendered thereon, is paid in full.' It was claimed that the rendition of judgment for the purchase price passed the title to the property. It was held that it did not have that effect, but that the vendor could take possession of the property under the contract.
>
> "It was held in *Couse* v. *Tregent,* 11 Mich., 65, that one in possession of personal property, of which he has made a conditional purchase,

> cannot, before the condition has been complied with, sell the property so as to vest the title in a *bona fide* purchaser. This rule has been restated in many subsequent cases, and in which it has been held that the contract need not be recorded as a chattel mortgage. The court below was clearly right in directing verdict for defendant."

There are a number of Massachusetts cases referred to in the Harkness case sustaining the position of the appellant in the case at bar. We will only quote from one of these. In *Coggill et al.* v. *Hartford & New Haven Railroad Co.,* 3 Gray, 545, 546, 547, Mr. Justice BIGELOW, speaking for the court, said:

> "It has long been the settled rule of law in this commonwealth that a sale and delivery of goods, on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee, and that the vendor, in case the condition is not fulfilled, has a right to repossess himself of the goods, both against the vendee, and against his creditors, claiming to hold them under attachments. *Hussey* v. *Thornton,* 4 Mass., 405; *Marston* v. *Baldwin,* 17 Mass., 606; *Burnett* v. *Pritchard,* 2 Pick., 512; *Whitewell* v. *Vincent,* 4 Pick., 449; *Hill* v. *Freeman,* 3 Cush., 257."

This Coggill case has been followed in numerous later Massachusetts cases. See: *Hirschorn* v. *Canney,* 98 Mass., 149, 150; *Nicholas* v. *Ashton,* 155 Mass., 205; *Wentworth* v. *Woods Machine Co.,* 163 *id.,* 28; *Catteral & Sons Co.* v. *Carter, Rice & Co.,* 173 *id.,* 155; *Oliver Ditson Co.* v. *William H. Bates,* 181 Mass., 455. All of the cases recognize replevin as the proper remedy to obtain possession of property from vendee.

It will also be noted that in the Harkness case, as in the case at bar, the purchaser had full notice of the rights of the vendor, and that the following extract from the opinion in the Harkness case is exactly in point, namely (p. 681):

> "But whatever the law may be with regard to a *bona fide* purchaser from the vendee in a conditional sale, there is a circumstance in the present case which makes it clear of all difficulty. The appellant in the present case was not a *bona fide* purchaser without notice. The court below find that at the time prior to the sale he knew the purchase price of the property had not been paid, and that Russell & Co. claimed title thereto until such payment was made. Under such circumstances, it is almost the unanimous opinion of all the courts that he cannot hold the property as against the true owners."

Again, if this question must be determined not by the general rule of law, but by the law of the jurisdiction where the property is located, and, in this instance, where the contract was made (*Green* v. *Van Buskirk*, 5 Wall., 307), then the agreement must be held to be a conditional sale.

The question of conditional sales has been presented to the Hawaiian courts in two cases. In the first, *Raymond & Wilshire* v. *Dole*, 4 Haw., 232, a conditional sale of personal property was upheld by the court, although an absolute and unconditional promise in writing had been given by the vendee to pay the purchase price, and the vendor was permitted to reclaim the property from the assignee in bankruptcy of the vendee. It is also of interest to note that in deciding this case the court based its decision on the definition of conditional sales given in Benjamin on Sales and the decisions of the Supreme Courts of Massachusetts, New Hampshire and New York, some of the authorities relied on by the Supreme Court of the United States in the Harkness case. In the other case, *Fowler* v. *Heeia Sugar Co.,* 5 Haw., 410, the court found that the evidence failed to establish the fact that a conditional sale had been agreed upon between the vendor and the vendee, but used this significant language (p. 414-5):

> "As to the law, this court has, in *Raymond & Wilshire* v. *Dole, Assignee,* adopted the principle contended for by the petitioners, and, without saying that we should go as far as some of the cases cited by the petitioners, we should feel bound, if the evidence were direct and unequivocal, to support the alleged contract, but such evidence should be positive and certain in its details as to the terms and stipulations of such contracts."

The form of the agreement in the case at bar, being a letter addressed to the Kona Sugar Company, positively refutes the contention made by defendant that the parties intended it to be a chattel mortgage. The parties are presumed to know the statutes of Hawaii regarding the acknowledgment and recording of chattel mortgages.

> "In a late case it was held that a receiver appointed for the purpose of taking charge of the property and assets of a corporation is vested by law with the estate of the corporation, and derives his own title under and through it, and that for the purposes of litigation he takes only the rights of the corporation, such as could be asserted in its own name, and that, upon that basis only could he litigate for the benefit of other shareholders or creditors."

> Gluck & Becker (2nd Ed.) Receivers of Corporations, section 58.

And at page 263 of the same section that author says:

> "The receiver acquires title by legal process and not in the regular course of dealing in commercial paper, and therefore he does not stand in the situation of an innocent *bona fide* holder for value." Citing *Briggs* v. *Merrill,* 58 Barbour, 389; *Van Wagner* v. *Paterson Gas Light Co.,* 3 Zabriski (N. J.), 283; *Bell* v. *Shibley,* 33 Barbour, 610.

Smith on Receiverships, Sec. 67, says:

> "The general rule is well established that a receiver takes the title of the corporation or individual whose receiver he is and that any defense which would have been good against the individual or corporation may be asserted against the receiver." Citing *Republic L. Ins. Co.* v. *Swiggert,* 135 Ill., 150; *Hyde* v. *Lynde,* 4 N. Y., 387; *Higgins* v. *Gilleshiener,* 26 N. J. Eq., 308.

And in the following section the same author says:

> "And generally the receiver takes the property of the debtor subject to all liens attaching thereto at the time of the appointment and all equitable defenses and set-offs." Citing *Adams* v. *Spokane Drug Co.,* 57 Fed., 889; *Bell* v. *Hanover National Bank,* 57 Fed., 822.

It appears furthermore that the bonds of the Kona Sugar Company were issued before the contract of conditional sale was entered into between plaintiff and the Kona Sugar Company.

The order of sale made by the court directed the receiver to sell the "right, title and interest" in the property of the Kona Sugar Company, and in the execution of that order by the receiver only the property of the Kona Sugar Company was sold. As the title to the property in controversy never passed to the Kona Sugar Company, it was not included in the sale of "its property."

The common law rule in regard to the sale of personal property undoubtedly prevails in the Territory of Hawaii, namely:

> "That a title to personal property cannot be acquired from a person who himself has not title to it, except only by a *bona fide* sale in market overt." Chit. Con. (8th Amer. Ed.), 342.

There is no such a thing as "market overt" in the Territory of Hawaii.

> "Only such title and interest passes on a sale by the receiver as was possessed by the party whose interest is being sold. The rule *caveat emptor* applies, and it is for the purchaser to ascertain what that interest is. This rule applies, it has been held, to the condition of the property, as well as to its title, and in an action for the purchase money it is no defense, in the absence of fraud or misrepresentation, that the property was in a defective condition." 23 Am. & Eng. Ency. of Law (2nd. Ed.), p. 1082.
>
> "As in other judicial sales, he who purchases at a sale made by a receiver is presumed to know that the receiver can sell only such interest in the property as is possessed by the parties to the action in which he is appointed; in other words, the doctrine of *caveat emptor* applies. He must ascertain for himself what that interest is, and also what the condition of the property is, because the rule applies not only to the title but to the condition of the

property." Beach on Receivers, p. 785, Sec. 737, also Sec. 734, Ed. 1891.

The same author also says (Ed. 1891):

> "The receiver can sell only the interest which he has in the property."
>
> "As to the title and condition of the property, the rule of *caveat emptor* applies, and the purchaser takes the property subject to all liens or outstanding interests therein." Smith on Receivers, Sec. 34, p. 100. See also High on Receivers (3rd Ed.), Sec. 199b.

In *Barron, Receiver,* v. *Mullin,* 21 Minn., 374, the court said, on pages 376-377:

> "The rule *caveat emptor* applies to purchasers at judicial sales. (*Bashore* v. *Whistler,* 3 Watts, 490; *Fox* v. *Mensch,* 3 Watts & Serg., 444; *King* v. *Gunnison,* 4 Penn. St., 171; *England* v. *Clark,* 4 Scam., 486.) The purchaser at such sales knows that nothing can be sold except the interest of the parties to the suit, and it is for him to ascertain before purchasing what that interest is. This rule applies not only in respect to the title, but to the condition of the property."

In the case of *Campbell* v. *Parker,* 59 N. J. Eq., 342, where a sale was made by a receiver without an order of court, it was claimed that it was not a judicial sale in the sense where the doctrine of *caveat emptor* applied.

The court, however, said in its opinion, on page 346:

> "I am unable to adopt that view. It seems to me that if a sale by a sheriff by virtue of a writ directed to him by this court is a judicial sale, *a fortiori* one made by a receiver who is appointed by this court and who is in a sense an arm of the court, and, so to speak, a part of

> it, is also a judicial sale. A sheriff is a ministerial officer, elected by the people, and is not identified with the court in the same sense that a receiver is."

This intention is clearly shown by the terms of the contract, the vendor retaining title to the property and the vendee consenting thereto. (*Hunt* v. *Bay State Iron Co.,* 97 Mass., 279.) The fact that the Kona Sugar Company did not have the fee to its right of way, except for a very small portion, would preclude the inference that it entertained any such idea, for it cannot be presumed to wish to construct a railroad for its lessors.

In *Gill* v. *De Armant,* 90 Mich., 425, the court said at p. 430:

> "The defendant's third claim was that the property taken by them and put in their mill at Petoskey was so annexed to the realty that an action of replevin could not be maintained, as its removal from the mill would be an injury to the realty to which it was attached. The court below ruled that the property had not become so attached. We think the court was correct. It was property belonging to the plaintiff, taken by the defendants and by them put in use in their mill. It was property capable of beneficial use if set up in any other place. No agreement is shown upon the part of the owner that the defendants might so attach it; and the defendants, under the circumstances here stated, cannot be permitted to make such a claim. Personal property may become a part of real estate where affixed to it, if such was the understanding between the parties; or it might remain personal estate, if the understanding to that effect was clearly indicated or fairly deducible from the circumstances. *Manwaring* v. *Jenison,* 61 Mich., 117; *Rogers* v. *Brokaw,* 25

> N. J. Eq., 496; *Blancke* v. *Rogers,* 26 *id.,* 563; *Voorhees* v. *McGinnis,* 46 N. Y., 278. Here the attempt is made to take the property of another and to attach it to the realty, without the consent of the owner, and then to assert that it is a part of the realty. The court below very properly held that this could not be done."

In *Duke* v. *Shackelford,* 56 Miss., 552, in a suit brought to replevin machinery, it was held that the property could not become a part of the realty, because sold on conditional sale for cash and a note, and it was not necessary to tender anything back.

The following cases are in point on the general principle of the right to maintain replevin against third persons claiming under the vendee: *Partridge* v. *Philbrick,* 60 N. H., 556; *Ferguson* v. *Lauterstein,* 160 Pa. St., 427; *Blanchard* v. *Child,* 7 Gray, 155.

The case of *Marquette Mfg. Co.* v. *Jeffrey,* 49 Mich., 283, is important as showing that replevin can be maintained on a conditional sale where machinery was fastened and permanently bolted down and the boiler walled up in a building owned by the vendees, standing on leased ground where a creditor of the vendee had seized it on execution.

To same effect as to trover, where the vendee had sold the mill property, but vendors did not know how the machinery was attached, see *Ingersoll* v. *Barnes,* 47 Mich., 104.

In *Wiggins* v. *Snow,* 89 Mich., 478, in replevin, there was no provision authorizing vendor to take possession. Such provision was held implied on default of condition.

The retention of the title by the vendor in the case at bar, as well as the fact that the title to the land was not in the vendee, would seem to show beyond question that the intention of the parties was to have the property in controversy retain the character of personal property.

In the class of cases among which the suit at bar falls, the intention is what governs as to whether the property is or is not a part of the realty. *Baker* v. *McClurg*, 196 Ill., 28; *Hewitt* v. *Gen. Elec. Co.*, 164 Ill., 420; *Sword* v. *Low*, 122 Ill., 487.

The foregoing authorities, we submit, abundantly sustain the contention of the trial court that the agreement under consideration was a conditional sale and not a mortgage, and that no title to the property in controversy ever passed to or vested in the Kona Sugar Company, limited, and that the appellant may maintain replevin to recover the same. It is equally clear, we believe, that the appellant has not made an election of an inconsistent remedy so as to deprive it of that right.

Respectfully submitted.

CHARLES H. ALDRICH,
HENRY S. MCAULEY,
HENRY W. PROUTY.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1906.

No. 212.

THE WILLIAM W. BIERCE, Limited, a corporation,
Appellant.

vs.

CLINTON J. HUTCHINS, Trustee,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

ANSWER TO REPLY BRIEF FOR APPELLEE.

CHARLES H. ALDRICH,
HENRY S. MCAULEY, and
HENRY W. PROUTY,
Attorneys for Appellant.

The trial court made a full finding of facts and conclusions of law and to these findings both of law and fact specific exceptions were taken by the appellee (Rec., 2-34), also (Rec., 109-111). The question was thus presented to the Supreme Court of the Territory. It was the manifest duty of the latter court to pass upon these findings. It did that, as we contend, when it specifically limited its adverse action to a reversal of the lower court upon the question of election between remedies. The conclusive character of these findings is shown by the cases collected, 4 Annotated Stat., 460 *et seq.*

Courts speak only by the orders, judgments and decrees entered. An appeal or writ of error cannot be predicated of what a court thinks or says apart from these. To this there is the single exception, as we believe, of language used or rulings made in the course of a trial deemed prejudicial and preserved by bill of exception or certificate. In the present case, in the judgment entered May 2nd, 1905 (Rec., 316), we find the following language:

> "And the exceptions thereto taken by the defendant as set out in his bill of exceptions in so far as they raise the question of election are sustained, and said cause is hereby remanded to the Circuit Court with directions to dismiss the plaintiff's petition with costs."

It can require neither argument nor comment to establish the fact that this limits the action of the court to the exceptions, the subject with and upon which the court was acting to those that "raise the question of election." At page 319 of the Record in the order modifying the judgment the same limitation again appears, and on page

320 of the Record we find the third and final judgment containing this language:

> "And the exceptions, in so far as they raise the question of election, are sustained, and the said cause is hereby remanded with directions to enter judgment for the defendant with costs."

It is from the decree thus made that this appeal is prosecuted, not from the opinion or opinions of the court or the several judges constituting the same.

It is now said that it is apparent from these opinions that the Supreme Court did not agree with the lower court with respect to other findings of fact and conclusions of law.

To this contention there are two conclusive answers: First, if the court wished to disturb or overrule any other finding of fact or conclusion of law, it was its duty to do so in express terms and embody its action in the orders entered in the cause. Instead of doing so it adopted all the other findings by limiting its action overruling the exceptions to those involving the question of election.

Second. Such reference or use of the Court's opinion is not permissible.

Williams *v.* Norris, 12 Wheat., 117.
Parks *v.* Turner, 12 How., 39.
Fisher *v.* Cockerell, 5 Pet., 248.
Rector *v.* Ashley, 6 Wall., 142.
Gibson *v.* Choteau, 8 Wall., 314, 317.
England *v.* Gebhardt, 112 U. S., 502.

To the same effect are:

Seaverns *v.* Lichinski, 181 Ill., 358.

Calumet Elec. St. Ry. Co. *v.* Van Pelt, 173 Ill., 70.

Noyes *v.* Children's Aid Soc., 70 N. Y., 481, 485.

Attorney General *v.* Continental Life Ins. Co., 90 N. Y., 45, 48.

Laning *v.* N. Y. Cent. R. R. Co., 49 N. Y., 521, 539.

Wheatland *v.* Pryor (Sup. Ct.), 44 N. Y., 311; affd. 133 N. Y., 97.

There are cases where this court has looked into the opinion to determine whether a federal question was involved, as in Murdock *v.* Memphis (20 Wall., 590), and cases since decided. These, however, have nothing to do with the question here involved. This court would not take a case as involving a federal question because the judge of the State court in his opinion discussed one, unless the right had been claimed and preserved in the record by one of the parties thereto.

In Weyer *v.* Beach, 79 N. Y., 409, the opinion at General Term stated that the reversal of the judgment was placed upon two grounds, one of which was that the court disagreed with the referee as to the facts. The order of reversal, however, did not state that it was made on a question of fact. Held, that in the Court of Appeals respondent could not avail himself of the view of the facts taken by the court at General Term, but must abide by the findings of the referee, there being some evidence to support thereof.

This, in principle, is in accord with the language of this court in Canal Company *v.* Gordon, 6 Wall., 561, 568, where the court said:

> "According to the rule of this court, the appellee can ask nothing here but what the

> decree gave him. It is the appellants who complain."

The decree in the Supreme Court of the Territory gave the appellee's exceptions support only so far as they raise the question of election. For the appellee to ask this court to find any other exceptions sustained violates the rule stated above and universally recognized.

We do not follow counsel in their attempt to rediscuss the doctrine of election as between the parties to the agreement or those claiming under them with full notice. The case stated in our original brief (p. 50) and the authorities cited (pp. 31-44) make clear the rule to be applied as between the parties and privies with notice where the rights of innocent third parties are not involved.

The findings clearly show, as does the record (to which appellee so mistakenly refers) that the lien suit was commenced upon a contract no longer in effect, and to secure rights to which the attempted lienor was not entitled for property which was not the subject and could not be made the subject of a materialman's lien. Such conditions do not afford an opportunity for a choice between remedies, and where they exist no election has taken place as between inconsistent remedies even if third parties have acquired interests in the subject matter of the suit.

So, too, the contract of March 13th, 1901, was a good conditional sale contract as between the parties and privies with notice, and even if that question as a question of fact were open, as it is not upon this record, or is to be considered by this court as a question of law, the title remains in plaintiff in error and the judgment of the Supreme Court of the Territory should be reversed with directions that a judgment be entered in the court below as originally found by the trial court.

Respectfully submitted,
CHARLES H. ALDRICH,
HENRY S. MCAULEY,
HENRY W. PROUTY,
Attorneys for Appellant.

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No. 212

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1906.

THE WILLIAM W. BIERCE ~~COMPANY,~~ LIMITED, a Corporation, Appellant, vs. CLINTON J. HUTCHINS, TRUSTEE, Appellee.	APPEAL FROM SUPREME COURT OF TERRITORY OF HAWAII.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

A. B. BROWNE,
ALEX. BRITTON,
JOHN W. CATHCART,
WILLIAM R. CASTLE,
DAVID L. WITHINGTON,
For Respondent.

HONOLULU:
HAWAIIAN GAZETTE CO., LTD.
1906.

No. 212

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1906.

THE WILLIAM W. BIERCE [redacted],
LIMITED, a Corporation,
Appellant,
vs.
CLINTON J. HUTCHINS, TRUSTEE,
Appellee.

Appeal from Supreme Court of Territory of Hawaii.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

An action of replevin in the Circuit Court of the First Circuit, Territory of Hawaii, commenced July 20th, 1903, judgment entered March 16th, 1904, for the property or for its value in the sum of Twenty-two Thousand Dollars ($22,000.00) from which the defendant took exceptions to the Supreme Court of the Territory of Hawaii, which, on the 28th day of January, 1905, reversed the judgment, and subsequently, on May 6th, 1905, on motion of plaintiff remanded the case to the Circuit Court with instructions to enter judgment for the defendant, upon plaintiff's statement that it would have no further evidence to present at a second trial in case the same was remanded to the Circuit Court for further proceedings; the action being to recover certain rails, cars, locomotives and equipment of a railroad on the plantation of the Kona Sugar Company, Limited, all the property of which company had been purchased by the defendant at a Receiver's sale.

On the 17th day of February, 1900, at a meeting of the Directors of the Kona Sugar Company, Limited, the plaintiff, through its agent, Mr. Frank Davies, whom it had sent to the islands to solicit business, made a contract of absolute sale of the railroad, track and equipment sought to be replevied, which was verbal and to be binding when accepted by the company's agents, M. W. McChesney & Sons. On the 21st the agent put the proposition into writing, which was accepted on the 22nd by the agents of the Kona Sugar Company, Limited. (Transcript pp. 145, 150.) By this contract the material was sold for specific prices and not for a lump sum and the terms of payment were: "Cash upon presentation of demand draft attached to bill of lading issued by initial line of railroad, showing that material had been shipped through to Honolulu." (Transcript p. 149.) Twenty-five Hundred Dollars ($2500.00) in paid-up stock of the Kona Sugar Company, Limited, being the first payment on account. The Kona Sugar Company, Limited, failed to pay these drafts, and the plaintiff sent Mr. Harry T. Gilbert to Honolulu to attend to the matter and collect the price of the railroad equipment (Trans. pp. 135, 157, 158); he effected a settlement, in the course of which he had his attorney prepare the letter, Exhibit "B," attached to the deposition of Columbus Bierce (Trans. pp. 153, 154); received Ten Thousand Dollars ($10,000.00) in New York exchange and a promissory note for Thirty-seven Thousand, Forty-four Dollars and Fifty-three Cents ($37,044.53) payable six months after date, which recited that it was secured by bonds of the Kona Sugar Company, Limited, of the value of Thirty-eight Thousand Dollars ($38,000.00). The letter with the acceptance, signed by the president and treasurer of the Kona Sugar Company, Limited, is as follows:

"Honolulu, H. I., March 13, 1901.

Kona Sugar Company, Limited,
Honolulu, H. I.

Gentlemen:—

In pursuance of the verbal arrangement made between your President and William W Bierce, Limited, we hereby offer the following terms in settlement of the contract between the Kona Sugar Company, Limited, and William W. Bierce, Limited, as evidenced by letter dated Feb. 21, 1900, and accepted by the Kona Sugar Company, Limited, Feb. 22, 1900:

We will take in settlement of this contract the sum of $10,000, U. S. gold coin, and the promissory note of the Kona Sugar Company, Limited, for the sum of $37,044.53, in favor of William W. Bierce, Limited, payable six months after date at the Whitney National Bank in New Orleans, bearing interest at the rate of seven and one-half per cent. (7½%) per annum and secured by First Mortgage Bonds of the Kona Sugar Company, Limited, of par value equal to the note, said bonds being portion of a duly authorized issue not exceeding $200,000. This offer is conditioned upon its acceptance by you, payment of the money and the delivery of the note, with collateral, before 4 p. m. on Thursday, March 14th, A. D. 1901.

Upon such payment being made to us before the hour named, we will deliver to you the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting delivery, upon the express condition and understanding that said rails, locomotives, cars, scales and other materials are and shall remain the property of William W. Bierce, Limited, until the full payment of the note above described, according to its terms.

Yours very truly,
(Signed) W. W. Bierce, Ltd.
By H. T. Gilbert."

"The above Terms are accepted this March 13th, 1901.

Kona Sugar Co., Ltd.
By its President, J. M. McChesney.
By its Treasurer, F. W. McChesney."

Upon receiving the drafts and note Gilbert caused the bills of lading of the various shipments of the railroad equipment to be released from the drafts before mentioned, which were cancelled. (Trans. p. 160.)

Gilbert testifies that he proposed a settlement upon this basis because he despaired of collecting the full purchase price in cash; that the instrument was drafted at his request by one of the plaintiff's attorneys and that after its execution the railroad equipment in question was transported from Honolulu to the Kona District and there used in constructing and operating the plantation railroad of the Kona Sugar Company, Limited, and that in December, 1901, when he was again on the island for the purpose of collecting the unpaid balance of the purchase price, he visited Kona and saw "the railroad equipment in question was used and operated in constructing and running a plantation railroad of the Kona Sugar Company, Limited, in connection with its sugar mill, and I then saw the locomotives and cane cars in operation in the work of hauling cane to the mill." On the 16th day of March, 1901, the settlement of March 13th, including the delivery of the company's note and bonds of the nominal value of Thirty-eight Thousand Dollars ($38,000) was ratified and approved but no mention was made of any written instrument signed or to be signed in behalf of the company nor of any reservation of title to the property; on the same date Fifty Thousand Dollars ($50,000) of its mortgage bonds were sold to Bishop & Company, bankers, One Hundred Thousand Dollars ($100,000) of the mortgage bonds were delivered to the agents to secure the balance of the account, and the president and treasurer authorized to execute a mortgage in the name and behalf of the company to secure the same. (Trans. pp. 173-174.)

The plantation proving unprofitable, upon proceedings had in the Circuit Court of the Third Circuit of Hawaii, a Receiver, M. F. Scott, was appointed, who was afterwards discharged, another Receiver, F. L. Dortch, appointed, and all the property of the plantation sold to the Appellee in this action and the sale confirmed June 1st, 1903, against the objection and appeal of

Appellant to the Supreme Court of the Territory of Hawaii (Trans. pp. 182-187).

McChesney v. Kona Sugar Co., Ltd., 15 Haw. 710.

The appeal by the Appellant from the confirmation of the sale to the Appellee was pending at the time of the trial of the present action in the Circuit Court of the First Circuit in the Territoy of Hawaii, and was decided June 4th, 1904, while the present action was pending on appeal.

From the poceedings in the case of *McChesney v. Kona Sugar Company,* all of which are in evidence in this case, but all of which are not printed, it appears that the William W. Bierce Company, Limited, first sought to recover the amount of its claim from and establish a mechanic's lien against the property of the plantation. In order to maintain this mechanic's lien it petitioned by intervention in the case of *McChesney v. Kona Sugar Company* for permission to sue the receiver, and in that suit sought to recover against the plantation on the claim. This suit was brought in order to secure the right of the plaintiff not to the property but to payment of the note, the proceedings being then carried on under an agreement of creditors, by which liens were to be preserved, and the plaintiff desiring to preserve its lien. The testimony of one of the attorneys for the plaintiff, E. B. McClanahan, Esq., cited in full by the plaintiff in his petition for mandamus is worthy of citation and we here give it:

"The Witness. As a result of a great many conferences between the officers of the Kona Sugar Co. and bondholders, stockholders and creditors, a committee was appointed, called a bondholders' committee, for the purpose of superintending the affairs of the corporation, which were then in the hands of a receiver, with the idea of and with the purpose of taking off the crop of sugar that was then maturing and realizing the sale of the sugar as an asset in order to pay the creditors of the corporation and clear its debts. This committee agreement was submitted to the court and received its approval, and under it for some time the receiver worked. The committee consisted of Cecil Brown, S. M. Damon and Mr. Humberg of Hackfeld & Co. Prior to the making of this committee agreement on the 12th day of May, we filed a notice of lien in this suit—in this matter. This lien was discontinued on the first of August, 1902,—No, suit was brought on this lien on the first of August, 1902, and on the 23rd of January, 1903, the suit was discontinued.

All of the acts which we did for Bierce & Co. at this time prior to the discontinuance of the suit looked towards the possible chance or possibility of saving the corporation's property. Everything was done to prevent an entire liquidation and surrender the loss of all these assets. When this purpose was finally abandoned it was because it was found to be impossible to save any of the assets of the corporation to pay anybody. We found that the receivers were running behind even in their receiver charges and couldn't pay the charges of the receiver itself, the receiver's certificates could not be paid. When this state of affairs came about and it was found then to be absolutely abortive and useless to attempt to do anything for the rehabilitation of the plantation, we then abandoned our mechanic's lien suit, dismissed it and had recourse to our replevin suit.

We didn't take this action in the first instance because we knew that to take those rails back off the property of the Kona Sugar Company would mean a collapse of the company at once, with loss of thousands to the creditors, because the railroad was absolutely essential to taking off a certain portion of the crop of the Kona Sugar Company, and the only reason for filing this lien which we thought we had a right to file at the time, without looking it up very carefully, the only reason for filing it was simply to fortify our position as a possible creditor or claimant of the estate.

When we filed this lien there was a certain provision in this creditors' contract which provided for a priority of payment of claims, and lien holders were preferred over certain other holders. We gave no thought whatever, at the time of filing the lien to whether it was a valid lien or whether it was an invalid lien. We have since learned that it was absolutely a nullity and of no value whatever to Bierce & Co. the filing of this suit. This is Bierce & Co.'s position from the start, so that they as bondholders occupied a more secure position in order to get their money than as lien-holders or common creditors, and it was the desire of Bierce to get their money in some way. They didn't want the property at the time, they wanted the money; they wanted the contract carried out; they wanted the note of the Kona Sugar Company paid, and we simply filed this lien at the time as an additional lever on the hold on the material so furnished. That is all." (Tr. pp. 95-97.)

On cross-examination the witness stated that Mr. Bigelow was a member of the firm and had entire charge of the matter on which he had testified; that the first claims to be paid under the arrangement from the sale of the sugar were the laborers who were threatening to do all sorts of things, and that his firm had absolute authority to do all that was fit and proper in the premises for Bierce and Company. That the lien was filed on May 12th, 1902, and the creditors' agreement was dated May 15th, 1902; that the lien suit which was brought on the first of August, 1902, was discontinued on the 25th of January, 1903, when things were chaos and everybody giving up, the bondholders being determined to write their bonds off at that time; that the petition and intervention were filed in the nature of an equitable replevin so that if the sale took place the right under this lien would be protected. (Trans. pp. 97-99.)

The action was originally brought by M. W. McChesney & Sons on March 28th, 1902, against the Kona Sugar Company and the First American Savings and Trust Company of Hawaii, Limited, a corporation, which held a deed of trust for the $200,000 of bonds. The latter appeared at the hearing, joined in the prayer of the petitioner asking for the appointment of a receiver, consenting thereto, and praying that a decree of foreclosure issue out of this court upon the property. (Trans. pp. 209, 210, 212, 213.) The final order of sale made April 20th, 1903, (Tr. pp. 220-224), after reciting a previous order of the 1st of November, 1902, in which it had been attempted to sell all the property of the Kona Sugar Company, subject to all liens of every kind and nature, at which no bidder appeared, and that the expenses of the receivership were increasing beyond the income and that the property would be absolutely and entirely unproductive, directed a sale of all and singular the property of the Kona Sugar Company "and all of its right, title and interest in and to lands, leasehold interests, rights of way, railroads, railroad equipment, locomotives, cars" and all other property of every kind and description free and clear of all liens and incumbrances of every kind, for the purpose of paying the debts and liabilities incurred by the receiver in the management and control of said property, and also such other property lien, compensations and disbursements of the receiver as may be directed to be paid by the order of the court to satisfy, liquidate and discharge so far as may be and in the order of their preference, all liens, claims or demands, legal or equitable, instituted against the Kona Sugar Company, and directed the execution of a conveyance to vest in the purchaser, the defendant in this action, the right, title and interest of the Kona Sugar Company, free and clear of all incumbrances. (Trans. pp. 225-226.)

Three days before the execution of the Creditors' Agreement under which the foreclosure was carried on, and to take advantage of that agreement, as Mr. McClanahan testifies, the plaintiff in this action filed his notice of lien (Trans. pp. 251-2), the property on which the lien was filed being described as follows:

> "All that certain cuttings, embankment, grading and filling, and track, switches, buildings, cars, engines and other property forming and constituting the line, roadway and equipment of the single track railroad of the Kona Sugar Company, Limited, said railroad being located on the plantation of the said Kona Sugar Co., Ltd., in the District of South Kona, Island of Hawaii, Territory of Hawaii, and its situation being more particularly described as follows: Beginning at the mill of the said company and thence running in a general southerly direction at an elevation approximately of 686 feet above the level of the sea for a distance of seven miles, more or less, from said place of beginning."

The lien was claimed for the sum of Thirty-seven Thousand Forty-four and 53/100 Dollars ($37,044.53) with interest, for the materials furnished in the construction and equipment of said railroad, a schedule being annexed, with the amount and value of the materials set forth in accordance with the contract of February 21-22, 1900, and on the 31st day of July, 1902, the plaintiff applied to the judge of the Circuit Court of the Third Circuit, for leave to join in the action upon said lien. M. F. Scott, Receiver of said company, which permission was granted by said court on the first day of August, on which date the plaintiff filed its complaint to enforce the lien in said court, (Trans. pp. 246-250,) setting forth the contract of February 21st, 1900, which was annexed to the complaint, that the materials were furnished at the prices and upon the terms agreed upon in said contract as set forth in the notice of lien; that they had been used by the Kona Sugar Company, Ltd., in the construction and equipment of its railroad; that plaintiff had done and performed its part of said contract, but that the defendant and receiver had neglected and failed to pay the sum of $37,044.53 for which the plaintiff claimed a lien upon said property, for which judgment was asked against both defendants and for the enforcement of said lien. This action was brought under Chapter 2 of the Acts of 1888, Civil Laws, sections 1741-1745, now found in the Revised Laws of Hawaii, 1905, sections 2173-2177.

While this complaint was pending the W. W. Bierce Company, Limited, on November 21st, 1902, filed a motion in said Circuit Court of the Third Judicial Circuit for leave to intervene in the action of *McChesney & Sons v. Kona Sugar Company, Limited,* on the grounds set forth in their petition of intervention, which petition was filed November 24th, 1902, which leave was duly granted by said court. (Trans. pp. 257-266.) In that petition as in the Claim of Lien and Petition to enforce the Lien above referred to, the plaintiff set forth the contract of February 21st, 1900, the furnishing of the materials under the contract to the Kona Sugar Company; that there was due $37,044.53, the filing of the lien upon the railroad, the bringing of the suit, also "that the said Intervenor William W. Bierce, Ltd., is the holder and owner of Forty-five Thousand Dollars worth of the first mortgage bonds of said Kona Sugar Co. Ltd.; which said bonds are secured by a mortgage upon all of the property of the said Kona Sugar Company, Ltd., including that property herein below in paragraphs XI & XII of this petition and intervention more fully referred to and described." That McChesney & Sons had filed a petition praying that all the property of the company should be sold subject to all liens of every kind; that a decree was made on the 5th of November, but that the decree was not in conformity with the prayer, in that it ordered the property to be sold, including the property on which William W. Bierce Company, Ltd., had filed a lien; "that each and all of said property thus decreed by the said court to be sold as aforesaid and advertised by the said F. L. Dortch, as Receiver of the Kona Sugar Company, Ltd., to be sold in the manner and form above set forth, is the same property which was conveyed by mortgage to secure to this intervenor, amongst other, the payment of the bonds hereinabove more specifically set forth as being now held by the intervenor herein."

Wherefore, the Intervenor prayed that the decree might be modified so as to save and except from the operation thereof all liens, rights and claims herein set forth and that the property might be sold subject to the said liens.

Apparently from the final decree of sale this modification was made, although it is not set forth in the record. But no sale was effected, although the same was attempted on the 4th day of December, 1902, and the 15th day of December, 1902. (Trans. pp. 220-1.)

The plaintiff, on the 23rd day of January, 1903, discontinued its lien suit and on the 3rd day of February, 1903, made a motion asking leave to join F. L. Dortch, the Receiver, as defendant in an action of replevin. (Trans. p. 208.) This motion was denied on February 5th, on the ground that it appeared that the plaintiff had previously filed a mechanic's lien and had also filed a Petition in Intervention to enforce the lien, and had discontinued its lien and suit; that other parties had filed materialmen's liens against the same property, and that suits had been instituted for their enforcement, which were then pending; that the First American Savings and Trust Company of Hawaii, Limited, had filed its answer in the court, alleging that it held a mortgage on all the property and praying for a foreclosure, and that as the plaintiff being a party to the action, knew all the facts, and as the granting of the motion would divest the Receiver of the property, permission was denied. (Trans. pp. 209-210.)

On February 12th, the plaintiff prepared and swore to another petition in intervention (Trans. pp. 211-219), in which after alleging the proceedings in the suit, the prayer of the defendant, the First American Savings Trust Company of Hawaii, Limited, to foreclose its mortgage, the appointment of the Receiver, the contract of February 21, 1900, the shipment of the goods under it, the fact that they arrived in Honolulu, but that plaintiff refused to deliver them to the Kona Sugar Company until payment or the making of the writing of March 13, 1901, which is alleged to be "a supplementary contract," the delivery of the goods, their use as a plantation railroad, that the title is still in the plaintiff, and that their continued use, wear and tear and consequent depreciation would cause great loss, wherefore, a return of the property was demanded. On the 26th day of February leave was granted to file said intervention. (Trans. pp. 207-8.)

On the 26th day of March, 1903, the plaintiff further applied for leave to join F. L. Dortch, Receiver, in this petition and this leave was granted on the 30th day of March. (Trans. pp. 202-204.)

In the meantime plaintiff had applied for leave to take the deposition of Columbus Bierce and Harry T. Gilbert in these proceedings . The affidavit of H. A. Bigelow, the attorney-in-fact of the plaintiff, (Trans. pp. 198-201,) upon this application sets out the sale of February 21st, 1900, the shipment of the goods, the demand for payment, the failure to pay, the instrument which he calls a letter dated March 13, 1901, the allowance by the Bierce Company of the Kona Sugar Company to take possession of the railroad equipment, that the Bierce Company did not intend to waive or surrender its rights of ownership of the property but "that they merely permitted the Kona Sugar Company, Limited, to take and use the same"; that at no time prior to January, 1903, did Columbus Bierce or the plaintiff have any knowledge that the railroad was on land in which the Kona Sugar Company had neither a fee simple nor a leasehold interest, but that they believed that it was run over land that was owned either in fee simple or in leasehold, and if such were not the case they would not have permitted the railroad equipment to pass into the possession of the Kona Sugar Company, Limited, nor would they have allowed lien proceedings or any proceedings of any nature whatsoever except for a direct recovery of possession of the property to have been instituted against the said Kona Sugar Company, Limited; and that as soon as Bicree & Company become aware or had any understanding that the railroad ran for the most part over land in which it had neither a fee simple or a leasehold interest, they directed a discontinuance of said proceedings. Depositions were taken under this appointment by stipulation. On the 20th of May answers were filed in this suit. The answer of the Kona Sugar Company, Limited, (Trans. pp. 190-192) alleged that the so-called supplementary contract of March 13, 1901, was executed without any authority of the Kona Sugar Company, Limited; that the Kona Sugar Company, Limited, never agreed nor consented to the same and that the Intervenor had waived all right or title under the alleged supplementary contract and had brought a suit against the Kona Sugar Company, Limited, in assumpsit, for the amount due in the note; that at all times such contract had been treated as void and of no effect, that the articles were sold outright and absolutely; it admitted the note had not been paid, but alleged that the same was secured by bonds still held by the Intervenor.

On the 20th of April, 1903, a decree and order of sale of all the estate and property was made in said action, as before set forth, free and clear of all liens on the ground that the interests of all parties would be best served and protected by the immediate sale of said property for the purpose of paying the debts and liabilities incurred by the Receiver in the management of said property, and to discharge all liens, claims or demands. The railroad, railroad equipment, locomotives, cars and so forth are specifically included. (Trans. pp. 220-224.) The sale was had on the 9th day of May and confirmed June 1st, confirmation being to the defendant in this action and the Receiver directed to convey the property in question, free and clear of all incumbrances. The plaintiff objected to the order of confirmation on the ground that the railroad equipment, locomotives, flat cars and cane cars had been sold and that they were the property of William W. Bierce (Trans. pp. 187-188), which objection was overruled June 5th, 1903, and appealed, which appeal was denied in the case above referred to (Trans. pp. 182-3-4).

The plaintiff also on August 25th, 1903, brought a writ of error to review the proceedings, particularly the order of sale of April 20th, A. D. 1903, assigning among other errors the directing the sale of said railroad and equipment, particularly while the intervention petition was pending and unsettled and in not excepting said property from sale. This writ of error was dismissed in the case above referred to (16 Haw. 258), the court holding that there was no error in the order of sale; that it did not purport to authorize the sale of any property except that of the Kona Sugar Company and that there was no evidence of any title of the plaintiff in any of the property ordered to be sold.

A demand was made on the defendant and the present action brought July 20th, 1903, for the property, in which the value of the property was set at Fifteen Thousand Dollars ($15,000). This amount was amended at the trial to Twenty Thousand Dollars ($20,000), and after the trial to Twenty-two Thousand Dollars ($22,000). At the trial the complaint was also amended by striking out the allegations that the contract of March 13th, 1901, was a supplementary contract, wherever the same appeared in the complaint. At the trial the plaintiff endeavored to show that the road ran over land upon which the Kona Sugar Company, Limited, had no right, either in fee simple or leasehold, but the testimony showed that none of the property purchased from the plaintiff was upon such land, but that the entire right of way had been secured by the Kona Sugar Company, Limited, excepting as to the portion of the road running on the Paris land, which was built entirely from material purchased from other people. Testimony of M. F. Scott (Trans. pp. 88, et seq.).

The court made findings of fact and drew conclusions of law, (Trans, pp. 266-271,) finding the making of the contract of February 21st, 1900, the shipping of the material, that it did not pass into the possession of the Kona Sugar Company, Limited, until after contract of March 13, 1901, was entered into; that the parties entered into the contract of March 13th, 1901; that the payment of the Ten Thousand Dollars ($10,000) and the giving of the note was intended to be and was in settlement of the contract of February 21st, 1900, and not as a consideration of the purchase price for the materials sued for; that the payment of the note for $37,044.53 was intended to be a condition precedent, the performance of which was to divest the plaintiff of the title to the property sued for; that the contract of the 13th of March, 1901, was an entire contract for a lump sum and was incapable of being apportioned so as to ascertain the price of lienable and non-lienable items, and that such contract was not intended as a chattel mortgage or an absolute sale with lien reserved to the vendor, but was a conditional sale; that some of the property was not in fact used in the construction of the railway and was not lienable; that the plaintiff did not at any time intend and did not in fact waive its title to the property sued for nor did it intend or make any election of remedies or rights so as to bar the bringing of this action, nor did it intend or in fact waive its title by bringing the action to enforce the materialmen's lien, nor rescind this contract of March 13, 1901; that the defendant took possession with knowledge of the plaintiff's claim and title; that the actual value was $22,000 and that the plaintiff had suffered damages in the sum of One Thousand and Forty-five Dollars ($1,045) in addition and that each and every material allegation of the plaintiff's complaint has been established by the evidence.

Under the head of conclusions of law the court found that the contract of February 21st, 1900, was adjusted and settled by the contract of March 13, 1901, that it was a conditional sale and not a chattel mortgage or absolute sale with lien reserved in the vendor; that the payment and giving of the note was in settlement and adjustment but not given as a consideration for the purchase price; that the condition precedent, the performance of which was to divest the plaintiff of the title to the property sued for was the payment of the note; that the contract of March 13, 1901, was an entire contract for a lump sum and contained lienable and non-lienable items; that the plaintiff had made no election of either remedies or rights so as to bar the bringing and maintenance of the action, and that the plaintiff was entitled to judgment as prayed for.

To these findings as well as to numerous rulings during the trial the defendant excepted, the Supreme Court in its decision filed January 28th, 1905, (Trans. pp. 292-299) sustained the exceptions so far as they raised the question of election, and reversed the judgment on the ground that the plaintiff "had previously elected and pursued an inconsistent remedy, namely, by bringing an action for the price of the property and to enforce a materialman's lien for the same on the theory that the title to the property had passed to the vendee, the Kona Sugar Company, Limited," holding further that the plaintiff's theory that it was not an election of remedy but a mistake of remedy, did not apply to the case; that while there is no election where a party attempts a remedy in ignorance of material facts or even in ignorance of his legal rights, if the rights of other parties are not prejudiced thereby, yet he could not institute a suit where he waived a privilege reserved for his benefit and afterwards retracted, that the remedy is not ineffectual merely because nothing could be realized, and the fact that in the present case it had been testified that the suit had been instituted without much thought as to its effectiveness and discontinued because it was seen that it would not yield financial results; that the claim of the novated contract had never been tried and that the facts in this case indicate that a portion at least of the material was lienable, as the first contract fixed the price of lienable items and the supplementary contract merely settled the payment of the amount due on the first; that the slight difference between the amounts was probably due to storage and other expenses; that the plaintiff was not ignorant of any of the facts in instituting the lien suit, and it was apparently an afterthought, after bringing the present suit, that the lien suit would have been ineffectual, a fact which could not be tried in the present suit; that while the findings of the trial court have the same effect as the verdict of the jury, on the question of election the material facts are undisputed and the construction of the contracts which are in writing is a matter of law for the court.

The plaintiff appealed for a rehearing on the grounds:

A. That the court failed to decide whether the plaintiff is entitled to a new trial in regard to the recovery of the non-lienable items.

B. That the Court should have decided the question of whether the mechanic's lien suit was effectual.

C. That the testimony of Gilbert and Bierce had been overlooked as to the character of the contract of March 13, 1901.

D. That the Court overlooked the consideration that the lien suit was based on the contract of February 21st, 1900, which had been abrogated by the contract of March 13, 1901.

E. That the Court committed error in assuming that the difference between the contracts was probably due to expenses of storage and otherwise.

F. That no one was misled by plaintiff's action.

G. Manifest error in deciding that plaintiff had made an election.

(Trans. pp. 300-303).

Thereafter the court requested further argument on the following questions:

If the contract was one of conditional sale or an executory contract to sell upon condition precedent—

1. Was it entire?
2. Could the lien suit have been maintained?
3. How far ought the Court to go in the question whether the lien suit could have been maintained?
4. If the lien suit could not have been maintained, did it show an election of rights?
5. Did the plaintiff have a right to elect between an absolute sale and a conditional sale or executory contract to sell?
6. If the defendant had pleaded the lien suit, would the plea have been had on demurrer?

Re-hearing was denied April 29th, 1905, the main opinion by Chief Justice Frear proceeding upon the assumption that the contract was a conditional sale (although it appears that the majority of the court was of the opinion that the sale was absolute), after summing up the points in the prayer for rehearing as follows: "1. That the Court should have decided, but did not do so, whether the plaintiff is entitled to a new trial as regards the items which, by reason of not having been attached to the realty, were not subject to a materialman's lien, and (2) that the court overlooked or did not give due consideration to certain points bearing upon the question whether the institution of the materialman's lien suit amounted to an election;" holding that as to the first of these grounds the court originally merely reversed the judgment of the trial court, not knowing whether plaintiff would be able to introduce further evidence bearing on the question of election, which would make it worth while to have a new trial, but as it was now admitted that no further evidence could be offered, that it is a necessary inference that plaintiff could not elect to treat the sale as absolute as to part of the property, and conditional as to the remainder and that the lien suit was in fact instituted as to all the items. As to the second point the former opinion was decisive and the election is not so much between remedies as between rights; between the right of the plaintiff to proceed upon the theory that the sale was conditional and the right to proceed on the theory that the sale was absolute.

Mr. Justice Hartwell joined in the concurring opinion, saying that plaintiff could not blow both hot and cold; that the results of the lien suit would have made the company a preferred creditor of the company's plantation, whereas, by claiming the property nothing else would be obtained than the property, and that the lien suit was a formal avowal made in court to treat the transaction as an absolute sale. (Trans. pp. 305-314.)

Thereafter, on motion of plaintiff, the decision was modified on May 6th, 1905, so that the case was remanded to the Circuit Court with instructions to enter judgment for the defendant with costs. (Trans. pp. 317, 319, 320, 321.) On May 11th, the plaintiff petitioned for findings of fact which are set out in the transcript, pages 322-333. This petition was denied May 16th on the ground that the court had no jurisdiction to make findings of fact. (Trans. p. 333.) On the same date an appeal was prayed for which was not allowed (Trans. pp. 333-5). It was renewed on May 31st and June 21st on the ground that it had been previously disallowed, (Trans. pp. 335-338,) but subsequently in this court the appeal was allowed December 4, 1905, (Trans. pp. 349-350). There is no statement of the facts of the case unless the findings of the Circuit Court above, which were reversed by the Supreme Court, constitute such a statement as is provided by the act of April 7, 1874.

ARGUMENT.

I.

THE TRANSACTION DID NOT CONSTITUTE A CONDITIONAL SALE.

Although the Supreme Court of Hawaii did not put its decision on this ground, a majority of that court held that the transaction constituted an absolute sale, and this conclusion is not only fortified by reason and authority, but we submit, is an inevitable inference from all the facts in the case. The device of attempting a contradiction in terms by apparently retaining the title in the vendor and then giving to the vendee not only the indicia of ownership but also powers which are inconsistent with the retention of title has been long the subject of judicial reprobation, and the rule is well settled that although there may be an express agreement that title is to remain in the vendor until the performance of some condition, the contract will be construed as an absolute sale where the other circumstances of the case indicate that the parties so intended. As was said by Mr. Justice Strong in the leading case in this Court:

> "It is quite unmeaning for parties to a contract to say it shall not amount to a sale, when it contains every element of a sale, and transmission of ownership. This part of the contract is to be construed in connection with the other provisions, so that, if possible or so far as it is possible, they all may harmonize." * * * "The notes became the absolute property of the vendor. As has been stated they all fell due within four months, and it was expected they would be paid. The vendors were expressly allowed to collect them at their maturity, and it was agreed that whatever sums should be collected on account of them should be retained by the vendors for their own use.
>
> "No part of the money was to be returned to the railroad company in any event, not even if the cars should be returned."

* * * "In view of these provisions, we can come to no other conclusion than that it was the intention of the parties, manifested by the agreement, the ownership of the cars should pass at once to the railroad company in consideration of their becoming debtors for the price."

Herryford v. Davis, 102 U. S. 205, 26 L. 160.

In a Colorado case the stipulation was: "It is further agreed that the title to such goods, or any part thereof, shall remain in the party of the first part until full payment in cash shall have been made," and the court said:

"In determining this question the entire transaction between intervenors and Smith must be considered, and its legal effect ascertained, not alone by any particular provision of the written contract itself, but from all the stipulations and agreements contained therein, as well as in the notes given in connection therewith. When so considered it is evident, notwithstanding the agreement itself provides that the title to the *seating* shall remain in Andrews & Co. until full payment in cash shall have been made therefor, thus evidencing an intent to make the sale conditional so far as the transfer of the title is concerned, that such an intention is rebutted by the terms and stipulations in the notes given in pursuance of the agreement, they being absolute obligations, making the purchaser unconditionally liable for the purchase price. The optional payment of the purchase price is as essential to constitute a transaction a conditional sale as the conditional passing of the title; and a transaction that in express terms imposes an unconditional liability upon the vendee to pay the purchase price for the property delivered, however characterized by the parties, is essentially and in legal effect an absolute, and not a conditional sale."

Andrews v. Colorado Savings Bank, 20 Colo. 313; 46 Am. St. Rep. 291; 36 Pac. 902.

In a Montana case the testimony was that the title was not to pass until the purchase price was paid, but a note was taken with a mortgage on other property and the court held that this showed that the sale was an absolute one. On the authority of *Herryford v. Davis,* the court pertinently says: "If the sale was merely conditional, the taking of a mortgage on other property would be utterly useless."

Silver Bow Mining & Milling Co. v. Lowry, 6 Mont. 288; 12 Pac. 652.

A Wisconsin case is likewise instructive. There the express condition was that the title did not pass until the note was paid. Winslow Judge, after saying that the courts do not favor a conditional sale, calls attention to the fact that a chattel mortgage had been given on machinery, which warranted title in the purchaser and that the giving of the mortgage on the machinery and the other property to secure the payment of the note "is utterly inconsistent with the idea of a conditional sale."

Aultman v. Silha, 85 Wis. 359; 55 N. W. 711.

We observe that in the present case the property was sold with the intention of being incorporated into the plantation as an integral part thereof; the testimony of Bierce is that the price was secured first, by the note, and second, by the mortgage on this property and other property, containing the usual covenants of warranty and lastly, by the reservation of title. (Tr. pp. 87-8.) This is the order which he puts and is the order of Exhibit "A."

In California in a case in which the contract provided that upon the payment of the price "the property is then to belong to said borrower, otherwise it remains the property of Palmer & Rey" and where the contract was in the form of a lease it was held that in spite of the reservation of the title, as the possession was delivered and the promise to pay was absolute (citing *Hart v. Barney,* 7 Fed. Rep. 553) and as there was a provision upon retaking to render the surplus to the borrower, the title passed and replevin could not be maintained. The learned Commissioner says:

"The policy of the law is against upholding secret liens and charges to the injury of innocent purchasers or encumbrancers for value, and in particular, that mortgages of personal property are permitted only in certain specified cases, and then only upon the observance of certain formalities, designed to insure good faith, and to give notice to the world of the character of the transaction, the provision as to mortgages cannot be evaded by any mere shuffling of words. Where it is clear from the whole transaction that for all practical purposes the ownership of property was intended to be transferred, and that the seller only intended to reserve a security for the price, any characterization of the transaction by the parties, or any mere denial of its legal effect, will not be regarded. The question, it is true, is one of intention; but the intention must be collected from the whole transaction, and not from any particular feature of it."

Palmer v. Howard, 72 Cal. 293.

The only case in Hawaii in which a conditional sale can be claimed to have been upheld was a conditional sale of a safe to a bankrupt, who went into bankruptcy before any payments were made, and it was held that the seller could reclaim the property, the court distinguishing the case on the ground that no part of the price had been paid before bankruptcy intervened and expressing no opinion if partial payments had been made and "deferred payments were required."

Raymond v. Dole, 4 Haw. 232.

In a case, the facts of which are almost identical with this—the sale of a plantation railroad which passed into the hands of a receiver—the judge before whom the case was tried upon a petition and intervention of the seller of the railway and rolling stock, to which the receiver set up the annexation to the soil and the property becoming a part of the security of the mortgages, ordered that the petitioner might remove all the railway tracks, cars, material and appurtenances in proportion to the unpaid balances of the purchase price, but the court held that the sale was absolute and that the railway and its appurtenances were covered by the prior mortgage, saying "that it would be contrary to public policy and injurious to the rights of third parties to allow the petition."

Fowler v. Heeia Sugar Co., 5 Haw. 410.

We think this case very persuasive. It is true that the court says that the claim had not been proved, but the evidence of all the witnesses support a conditional sale.

From these cases it is apparent that, as the validity of conditional sales has not been determined within the jurisdiction where the contract was made, resort is properly had to the decisions of this court. The leading case and the case upon which Appellant relied in the lower courts is that of *Harkness v. Russell,* 118 U. S. 663, 30 L. Ed. 285, in which Mr. Justice Bradley held, on an appeal from the Supreme Court of Utah to recover the value of two steam engines and boilers in a portable saw mill sold in Idaho under a written contract that the title should not pass until full payment, containing an express provision authorizing the vendors to take possession whenever they deemed themselves insecure even before maturity of the note, with the right, if the property were taken back, to sell the same, to endorse the true value on the note and to recover the balance as damages and rental.

> "It cannot be said, therefore, that the stipulations of the contract were inconsistent with or repugnant to what the parties declared their intention to be; namely, to make an executory and conditional contract of sale. Such contracts are well known in the law and often recognized."

After reviewing the decisions in various states and showing that in these with the exception of Illinois, the view of the law announced by the learned Justice is sustained, the case of *Herryford v. Davis, ubi supra,* was distinguished on the ground that "it contained provisions so irreconcilable with the idea of its being really a lease and so demonstrated that it was an absolute sale with a reservation of a mortgage lien that the latter interpretation was given to it by the Court." This court finally concluded that there is nothing either in the statutes or adjudged law of Idaho to prevent the operation of the general rule already cited.

We accept this decision as the rule of guidance in the case at bar, and will apply it in the light shed upon it by subsequent decisions of this court.

Thus Mr. Justice Harlan says that:

> "The agreement in question (in *Harkness v. Russell*) * * * expressly declared that neither the title, ownership nor possession should pass from the seller until the note given by the buyer for the stipulated price was paid."

Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69; 32 L. ed. 854.

Undoubtedly, the learned Justice, means, not possession, but the right to possession.

In a later case the same learned Justice, after quoting *in extenso* from the case of *Herryford v. Davis,* says:

> "It is a mistake to suppose that there is any conflict between these views and those expressed in the subsequent case of *Harkness v. Russell,* 118 U. S. 663, 680 (30: 285, 291), where the whole doctrine of conditional sales of personal property was carefully examined, and in which the particular instrument there in question was held to import not an absolute sale but only an agreement to sell upon condition that the purchasers should pay their notes at maturity. With the principles laid down in the latter case we are entirely satisfied. But as pointed out in *Arkansas Valley L. & C. Co. v. Mann,* 130 U. S. 69, 77, 78 (32 L. ed. 854, 857, 858), the agreement in *Harkness v. Russell* was upon the express condition that neither the title, ownership nor possession of the engine and saw mill which was the subject of the transaction should pass from the vendor until the note given by the vendee for the stipulated price was paid. Turning to the notes here in suit, we find every element of a sale and transmission of ownership, despite the provision that the title to the cars should remain in the payee, until all the notes of the series were fully paid."

Chicago Ry Equipment Co. v. Merchants' Nat. Bank, 136 U. S. 268, 34 L. ed. 349.

From these decisions it would appear that the rule laid down by this court is that a conditional sale should not be inferred, but that where the intent to preserve the title in the vendor is clear and there is nothing inconsistent therewith in the transaction, particularly if the right to possession is reserved, then the condition will be maintained.

Applying this rule to the case at bar we find that the intent to reserve the title is not clear and that the inconsistencies are overwhelming. The plaintiff originally sent its agent to sell the property and made an absolute sale without any reservation of title. It again sent an agent to collect the price. While this agent wrote a letter containing the statement that the title was to be reserved the assent of the Kona Sugar Company is equally necessary to this change, and the record of the action of the directors of the company put in by plaintiff shows that the only authority given to its officials was to sign the note and deliver the bonds, not to change the contract. This evidence was put in by plaintiff to show the validity of the alleged contract of March 13th, 1901. It therefore does not appear that the Kona Sugar Company ever intended to assent to the reservation of title. Again, as a part of the transaction, negotiable promissory notes were taken, apparently in absolute payment, which were indorsed to a third party, and no suggestion is made of their return. Security was taken in the form of mortgage bonds upon this identical property, and within a month Gilbert was given authority to sell the bonds and to negotiate the note, which was indorsed to him, which, according to some authorities, would have been a waiver of lien (*Bank v. Thomas,* 69 Tex. 237; *Burch v. Pedigo,* 113 Ga. 1157; 39 S. E. 493; 54 L. R. A. 808). The property was delivered with the assent of plaintiff for the purpose of being attached to and used as an integral part of a sugar plantation. It further brought a mechanic's lien for the purchase price of the various articles claiming under the original contract and entirely ignoring the alleged conditional sale; upon this it brought its suit in assumpsit to enforce the lien. Not satisfied with this, foreclosure proceedings having been instituted upon the mortgage, it intervened, set up its mortgage bonds and its mechanic's lien upon the property, relying upon the original contract, joining in the foreclosure; it was not until it became evident in January, 1903, that no one would get anything, that it for the first time made any claim to recover the property, and it then did so upon the ground of a mistake of fact in that the sale had been made and the mechanic's lien filed on the theory that the Kona Sugar Company, Limited, owned its right of way, (a theory consistent with an absolute sale,) and it was upon the theory of a mistake of fact that it brought a further petition in intervention seeking to recover the property, which has been decided against it. It was not until after the trial was begun and it appeared that the plaintiff must fail on its claim that it had been deceived as to the facts, that it for the first time claimed that it was entitled to recover the property on an alleged conditional sale regardless of any mistake of fact.

We submit the entire agreement with the construction put upon it by the parties, and the circumstances which surround it show that it was not the intention or agreement of the parties to reserve the title; and that the terms of the agreement, the construction put upon it by the parties and the circumstances which surround the agreement are all inconsistent with such theory.

Some of these grounds we will separately examine:

(a) Whether the mortgage be prior, contemporaneous or subsequent, it is inconsistent with the theory of the vendor's retention of the title that the plaintiff should have delivered the property to be affixed to the realty.

The general rule seems to be that personal property incorporated in a mortgaged estate with the intention to make it a permanent part thereof becomes part of the mortgage security, and the vendor and vendee cannot as against the mortgagee preserve its character as personalty, although it can be removed without injury either to the realty or the value of the mortgage security.

Fuller-Warren Co. v. Harter, 110 Wis. 80, 85 N. W. 698.

This case ably discusses the cases and adopts the so-called Massachusetts rule as applied to railroads. The law seems to be well settled that railway tracks laid down for permanent use are a fixture and part of the realty and pass even with pre-existing mortgages.

Jones on Railway Securities, Sec. 109.

And such is the rule in this court:

"Whatever is the rule applicable to locomotives and cars, and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes, as to their being unaffected by a prior mortgage given by a railroad company, covering after acquired property, it is well settled in the decisions of this court that rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of bona fide creditors, as against any contract between the furnisher of the property and the railroad company, containing stipulations like those in the contracts in the present case. *Dunham v. R. Co.,* 68 U. S. 1 Wall. 254 (17:584); *Galveston R. R. v. Cowdrey,* 78 U. S. 11 Wall. 459, 480, 482 (20:199, 206); *U. S. v. New Orleans R. R.,* 79 U. S. 12 Wall. 362, 366 (20:434, 436); *Dillon v. Barnard,* 88 U. S. 21 Wall. 430, 440 (22:673, 678); *Fordick v. Schall,* 99 U. S. 235, 251 (25:339, 342.)"

> *Porter v. Pittsburg Bessemer Steel Co.,* 122 U. S. 267; 30 L. ed. 1210.

This case was cited and applied in an action where it was sought to displace a former mortgage by a mechanic's lien, where Mr. Justice Brewer, in deciding these propositions, says that the record imparted notice of the terms of the mortgage and that this express lien could not be displaced by a contract with a third party.

> *Toledo Ry. Co. v. Hamilton,* 134 U. S. 296, 33 L. ed. 905.

In another case where the question was between the contractor to build a section of the road and the prior mortgagee the court held that the prior mortgage was a first lien upon the rails and other fixtures; that all persons claiming in privity with the company were debarred from asserting that the mortgage did not cover all the property and rights which it professes to cover; citing *Galveston H. & H. R. Co. v. Cowdrey,* 78 U. S. 11 Wall. 459, 20 L. ed. 199, the court continued:

"That by the common law whatever is affixed to the freehold becomes part of the realty, except certain fixtures erected by tenants, which do not affect the question; and that the rails put down upon the company's road become a part of the road. Here the same rule applies, and not only the rails but those permanent fixtures which are essential to the successful operation of the road, become a part of the property of the company, as much so as if they had existed when the mortgage was executed.

"The doctrine that a vendor not taking security for the price of realty sold by him holds in equity a lien upon the property for such price is not controverted, but it has no application to the present case. The only right which the complainants possessed was that which was recognized by the decree—a right to redeem the property from the sale under the mortgage—a right which they were allowed to exercise within a specific period; but, they declining to do so, the biil was properly dismissed."

Thompson v. White Water Valley R. R. Co., 132 U. S. 68, 33 L. ed. 256.

In the Galveston Ry. case the court said that under a mortgage of a railway which assumed to convey and mortgage "the railroad which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures and rolling stock, these several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases."

Galveston H. & H. R. Co. v. Cowdrey, ubi supra.

These cases and others cited under the next head have been commented on favorably in a more recent case, which collects the authorities which hold that the track is a necessary and inseparable incident to the enjoyment of the right of way.

New Mexico v. U. S. Trust Co., 172 U. S. 171, 43 L. ed. 407.

The strong inclination of the courts is to hold that a conditional sale is not binding upon creditors, purchasers or incumbrancers, who are deceived or are likely to be deceived by the secrecy of the contract.

Collins v. Houston, 138 Pa. 431; 21 Atl. 234.
Loving Pub. Co. v. Johnson, 68 Tex. 273; 4 S. W. 532.
Ryder v. Cooley, 58 Conn. 367; 20 Atl. 470.

As was said in an Alabama case, which we shall cite upon another point, any inequitable act on the part of the vendor treating the property as the property of the vendee is a waiver and abandonment of the title reserved on the sale.

Hickman v. Richburg, 122 Ala. 638; 26 Southern 136.

The sale of machinery or other personal property to be attached to the freehold by the vendee is such an inequitable act, and trover will not lie on behalf of one who furnished machinery for a mill under a contract providing for a payment down and the balance on time, the title not to pass or the machinery become a fixture by being put into any mill until full payment is made; yet, if the plaintiff understood when he sold the machinery that it was purchased for the purpose of being attached to the realty, he could not maintain replevin.

Jenks v. Colwell, 66 Mich. 420; 33 N. W. 528.

"It is very doubtful whether the plaintiff was entitled to maintain replevin even under his construction of the contract. It may be admitted that the buildings in question were chattels, and the doubt remains just as serious. A lease for years is also a chattel, but if a tenant for years sublets, and the subtenant holds over after his term, the remedy is clearly by forcible entry and detainer, and not replevin. It is the nature of the thing itself, and not that of the plaintiff's property in the thing, which determines whether forcible entry and detainer or replevin will lie. It is true, as pointed out by the plaintiff, that this court has held, under certain peculiar circumstances, that buildings may be chattels personal, and subject to replevin; but to allow replevin to be maintained under such circumstances as these makes the writ in effect a writ of restitution for land,—an office which it cannot be permitted to fulfill. Replevin is, in any case, a harsh remedy, permitting the plaintiff to take property upon his bare allegation of ownership, and before any opportunity to try the issue. The court should be very jealous of extending the action beyond the cases to which it was designed to apply."

Oskamp v. Crites, 37 Neb. 837; 56 N. W. 394.

We cite also a line of cases where machinery, consisting of motive power, such as generators, for an electric railroad, is affixed thereto and an indispensable part of the railway, the court will not permit the title to be asserted on a conditional sale any more than in the case of the tracks of the railway itself.

Phœnix Iron Wks. v. N. Y. Security & Trust Co., 83 Fed. 757.

N. Y. Security & Trust Co. v. Capital Ry. Co., 77 Fed. 529.

Evans v. Kister, 92 Fed. 828.

In these cases the rights of mortgagees to after acquired property were declared, but a distinction drawn as to the rolling stock, a distinction which we will hereafter show is not pertinent to this case, as the mortgage contemplated the railroad with the rolling stock as a part of its security, and the vendor took a lien on this rolling stock as well as upon the realty, to secure the purchase price.

As to the articles claimed not to be affixed to the realty the only ground on which the plaintiff can recover is that he had no lien since there was an entire contract for an entire sum, but if some of the articles were to be affixed then the delivery of these to be affixed would be inconsistent with the retention of title to any.

The Massachusetts cases referred to fully support the proposition that where property, whether it be machinery, rails or similar property, is delivered to be attached and which is attached to a railroad, it becomes so inseparably incorporated that it cannot be removed for non-payment of the price, as against a bona fide purchaser or incumbrancer or mortgagee.

> *Hunt v. Bay State Iron Wks.*, 97 Mass. 279.
>
> *Hopewell Mill Co. v. Taunton Savings Bank,* 150 Mass. 519; 23 N. E. 327.
>
> *Meagher v. Hays,* 152 Mass. 228; 25 N. E. 105.

Whether the rolling stock and equipment of a railroad is real estate or personal property, and it has been well said that this court inclined to regard them as chattels real, it is well settled that the rolling stock as respects mortgages is inseparably connected with the road bed and is a fixture.

> *Milwaukee & M. R. R. Co. v. James,* 6 Wall. 750.
>
> *Pennock v. Col.,* 23 Howard 117, 16 L. ed. 436.
>
> *Galveston R. R. Co. v. Cowdrey, ubi supra.*

Neither is this rule modified by cases like

> *United States v. New Orleans & Ohio R. R. Co.,* 12 Wall. 362; 20 L. ed. 434, and
>
> *Fosdick v. Schall,* 99 U. S. 251, 25 L. ed. 339.

as to loose property susceptible to separate ownership, for in this case, unlike the vendor in those cases, the mortgage upon the same property was within the contemplation of the parties as a part of the transaction, nor is it like the case of *Bear Lake, etc.,* *Co. v. Garland,* 164 U. S. 1, 41 L. ed. 327, where the property came into the hands of the mortgagor subject to the lien. The principle of the latter case is, as Mr. Justice Peckham says in the opinion "in entire harmony with the Galveston Railroad case" and we concede that where a railroad acquires loose property as for instance locomotives either as additional or to replace worn-out engines after the execution of the mortgage although the lien of that mortgage attaches to the locomotives, yet if nothing but an equitable title passed the lien of the mortgage only attaches to that equitable title, but if the mortgage is made of a prospective railroad to be fully equipped, the rolling stock being necessary to the operation of the road, we submit that in that case where the mortgage clearly contemplated the equipment of the road in order to operate it, that this court would be loath to hold that a vendor having knowledge of the mortgage could retain title for the original equipment on the basis of which the mortgage was made, and which was necessary to make the entire enterprise a going concern; but in the case at bar it does not appear that the mortgage was prior, it is apparently contemporaneous, and our contention is that since the whole transaction is to be construed, the law will not allow the vendor to say as against other bondholders that the mortgage is not a prior lien on this equipment. It is a case of a contract inconsistent in itself.

In a case already cited Mr. Justice McKenna says in speaking of the principles which apply to the corporeal quality of railroads:

"One of these and an elemental one, is that whatever is erected upon it becomes part of it. There are exceptions to the principle, but as we are not concerned with them, we need not state them. Applications of the principle to railroads are illustrated by the decisions of this court and by those of other courts. As to rails put down against him from whom purchased *Galveston H. & H. Railroad Co. v. Cowdrey,* 11 Wall. 459 (20:199); *United States v. New Orleans Railroad Co.,* 12 Wall. 362 (20:434); *Thompson v. White Water Valley R. Co.,* 132 U. S. 68 (33:256), even though the contract of purchase provided that the property should remain that of the vendor and he have a right to remove the same *(Porter v. Pittsburg Steel Bessemer*

Co., 122 U. S. 267 (30:1210, and cases cited); in determining the relation of the rails to the right of way, *Joy et al. v. City of St. Louis,* 138 U. S. 1 (34:843). In this case, Mr. Justice Blatchford said: "The track cannot be separated from the right of way, the right of way being the principal thing and the track merely an incident. A right of way is of no particular use to a railroad without a superstructure and rails; the track is a necessary incident to the enjoyment of the right of way."

New Mexico v. U. S. Trust Co., ubi supra.

See also:

Palmer v. Forbes et al.. 23 Ill. 301.
Hunt v. Bay State Iron Co. et al., 97 Mass. 279.
City of New Haven v. Fair Haven & W. R. R. Co., 38 Conn. 422.

We also cite to the point that the innocent purchaser for value, which includes an execution creditor, a mortgagee, and anyone claiming under such, is not affected by the agreement and that, as to him, it is waived.

Thompson v. Smith, 111 Iowa 718; 83 N. W. 789.
Stillman v. Flenniken, 58 Ia. 450; 10 N. W. 842.
Fifield v. Farmers' National Bank, 148 Ill. 163; 35 N. E. 802.

Western Transportation Co., 37 Barbour 509.

The rights of the mortgage bondholders are available here as a defense in replevin for the rolling stock as well as the rail, as Hutchins, as the successor to the rights of the mortgagees under the sale, is entitled to make this defense.

Ryles v. Knowles Loom Wks., 87 Fed. 976.

He is also entitled to make all the defenses which the receiver, whose title he received, could make and replevin would not have lain against the receiver under these circumstances.

Hart v. Barney & Smith Mfg. Co., 7 Fed. 543.

(b) Taking the negotiable promissory note, the endorsement of it and the proposed sale of the collateral is inconsistent with a conditional sale.

Bank v. Thomas, ubi supra.
Burch v. Pedigo, ubi supra.
Farrar v. Brackett, 86 Ga. 463; 12 S. E. 686.
McCullough v. Prichett, 120 Ga. 585; 48 S. E. 148.

(c) Taking the mortgage bonds as security was inconsistent with the retention of title in the plaintiff.

Taking the mortgage bonds cast the fortune of the plaintiff with the other holders of the bonds. As was said by Mr. Justice Brewer in a case where it was sought to enforce a mechanic's lien by a builder of a dock, in which it was held that the mechanic's lien was subordinate to the first mortgage bondholders, the mortgage was notice to all the world of the lien, and in that point of view the case does not show a hardship, as the plaintiff must have known that he took subject to the rights of the other bondholders. Acting with full knowledge of all the circumstances plaintiff has no right to complain if its agreement is less remunerative than if the bondholders had joined with the company in making a contract.

Toledo R. R. Co. v. Hamilton, 134 U. S. 296 (33-905).

As a bondholder it is estopped from asserting that the mortgage does not cover all the property and rights which it professes to cover, that the rolling stock as well as the superstructure and fixtures of the road as it came into existence become instantly attached to and was covered by the mortgage.

Galveston R. R. Co. v. Cowdrey, ubi supra.

Taking the mortgage which presumably warrants that the title is in the Kona Sugar Company, Ltd., is clearly inconsistent.

Austin v. Hamilton, 96 Ga. 759; 22 S. E. 304.
McCormick Harvester Co. v. Lewis, 52 Kan. 358, 35 Pac. 12.
Aultman v. Silha, ubi supra.
Silver Bow Mining Co. v. Lowrer, ubi supra.

(d) The delivery of the property and its use without claim of title for two years is inconsistent with the claim of the vendor's retaining title.

The mere delivery of the property itself has been held presumptive evidence of the waiver of the condition.

Peabody v. McGuire, 79 Me. 572; 12 Atl. 630.
Farlow v. Ellis, 15 Gray 229.

And the granting of additional time was such a waiver.

Cole v. Hines, 81 Maryland 476; 32 Atl. 196.
Hutchins v. Munger, 41 N. Y. 155.

How much more is the definite intention that the property should be incorporated into the plantation, should come under the security of a mortgage being negotiated at the same time, and the security of which mortgage was taken to secure the purchase price.

The property was delivered in March of 1901. No claim of a conditional sale was made until February, 1903. The letter of the agent of plaintiff with the assent of the president and treasurer of the Kona Sugar Company upon it appears to have been within the exclusive possession of the plaintiff, and even if known was treated as of no consequence by all parties. In the meantime the property sold had been incorporated into the plantation, was used as an essential part of its operating machinery, the plaintiff was retaining the note and the bonds to secure it, evidently relying upon this security to collect its debt, until the plantation was placed in the hands of a receiver, and even then it did not rely upon the alleged conditional sale. As Mr. Bierce testifies, it was not until he became convinced that the plantation was a failure and was not going on, that it claimed a conditional sale. In the meantime hundreds of thousands of dollars of debt had accrued on the faith of the plantation as a whole, and the situation of the parties had been materially changed. We think the failure to enforce the lien under these circumstances or to make any claim shows a construction of the contract inconsistent with such rights.

Hickman v. Rickburg, ubi supra.

(e) The agreement contained no provision for recaption.

(f) The agreement contained no provisions in regard to the relations of the parties should the property be retaken.

There is no provision that the property be sold and applied on the note, the vendor holding the balance as damages for breach of contract, nor for the return of the note on the retaking of the property, or that the sums paid should be considered as rent for the value of its use—none of the ordinary provisions fixing the rights of the parties upon the retaking, are contained here. The absence of these provisions show that a conditional sale was not in the minds of the parties.

II.

IF THE SALE WAS CONDITIONAL, THE CONDITION WAS WAIVED.

(a) The delivery of the material to be affixed or used as an integral part of the Kona Sugar Company's plantation, mortgaged as a whole to secure the bonds, is such a waiver.

The authorities cited under the last head covers this point.

(b) The filing of the mechanic's lien is a decisive act of the party determining his election between two alternative and inconsistent rights, namely, the right to claim the title to the property as in the plaintiff, or the abandonment of the claim of title and the assertion of the right to claim a lien against it as the property of the Kona Sugar Company.

As was said by Mr. Justice Holmes in *Snow v. Alley,* 156 Mass. 193, relied upon by the plaintiff:

"Election exists when a party has two alternative and inconsistent rights and it is determined by a manifestation of choice."

The right which the plaintiff had was to claim the title to the property or to waive that claim, and the filing of the mechanic's lien was a distinct manifestation of choice to waive the claim of title. It is a decisive act of the party determining his election made with knowledge of his rights.

Sanger v. Wood, 3 Johnson 416.

The doctrine of *Butler v. Hildrith,* 5 Metcalf 49, has been fully affirmed in a case in which the court reviewed the cases and said:

"In *Connihan v. Thompson,* 111 Mass. 270, at p. 272, the court said: 'The defense of waiver by election arises where the remedies are inconsistent; as where one action is founded on an affirmance and the other upon the disaffirmance of a voidable contract or sale of property. In such cases, any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties, once for all. The institution of a suit is such a decisive act; and if its maintenance necessarily involves an election, to affirm or disaffirm a voidable contract or sale, or to rescind one, it is generally held to be a conclusive waiver of inconsistent rights, and thus to defeat any action subsequently brought thereon.'

"The rule established by these cases is that any decisive act by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and that one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such an act."

Robb v. Voss, ~~115~~ 155 U. S. 13, 39 L. ed. 63.

The attempt even though it be ineffectual, to establish a materialman's lien on property sold is an election to waive the condition in a conditional sale, and is an abandonment of the title reserved.

Hickman v. Richburg, ubi supra.
National Foundry, etc., Wks. v. Oconto, etc., Co., 113 Fed. 793.
Kenney v. Townsend, 124 Iowa 332; 100 N. W. 48.
Lehman v. Van Winkle, 92 Ala. 443; 8 South. 870.

There is no evidence in this case of any lack of knowledge of the facts. The plaintiff sought to show that these rails were laid upon the property to which the Kona Sugar Company had no right, the evidence absolutely shows that they were attached to the property where a right of way had been acquired. The plaintiff completely failed to show that its lien was ineffectual.

The claim of the plaintiff on this point is that the contract for the sale of the material was for an entire price and therefore not lienable. It is sufficient to say that this fails for two reasons. Under the law of Hawaii whether plaintiff could have enforced its lien or not, it could have obtained a judgment in its assumpsit suit against the receiver whom it had been allowed to sue. What priority would have been allowed the judgment is another matter. The remedy was not ineffectual even if it be admitted that the lien could not be established.

> *Holt Mfg. Co. v. Ewing,* 109 Cal. 353.
> *Ormsby v. Dearborn,* 116 Mass. 386.
> *Nield v. Bourbon,* 49 Mich. 53.

The cases cited by plaintiff in the Supreme Court of Hawaii do not sustain the converse of this proposition. They are discussed in the petition for rehearing and the strongest of these is *Johnson-Brickman Co. v. Mo. Pac. R. R. Co.,* 126 Mo. 344, which cites as an authority for its decision *Butler v. Hildrith,* which holds the reverse. In addition to the reasons pointed out by the Supreme Court of Hawaii for not following the Missouri case, there is a ground upon which it can be reconciled with the current of decision, namely, that the plaintiff in bringing the attachment suit in that case, acted under a mistake of fact, supposing that it had attached the property when in fact the property was not held under the attachment. The case shows merely an attempt to attach by garnishee process, and in fact no attachment was made.

Waiving the suggestion of the Supreme Court of Hawaii that plaintiff had at least the right to try that question and that the present forum was not the appropriate one to try it, it had a lien. The original complaint set forth the agreement of March 13, 1901, as supplementary to the contract of February 21-22, 1900, while the amendment alleges that it was made to "settle and adjust" the contract of February 21-22, 1900; the terms settle and adjust do not mean the substitution of a new contract for an old one, the word "Settlement" as used in the agreement of March 13, means a settlement of the terms of payment. The words "settle or adjust" when applied to a liquidated account or demand, as in this case, mean to pay it.

> 1 Am. and Eng. Ency. of Law, p. 641.
> *State v. Staub,* 61 Conn. 553-568.

So the settlement made by the agreement of March 13, 1901, did not affect the price of the materials as set forth and ascertained by the contract of sale and purchase of February 21-22, 1900. The amount stated in the agreement of March 13, 1901, was the same as in the contract of February 21-22, 1900, less the value of the rails not delivered with the charges ordered. There being nothing in relation to the material, or the price thereof, contained in the agreement of March 13, 1901, that is inconsistent with the contract of February 21-22, 1901, the two should be construed together. When a second contract does not expressly abrogate the first, and is not wholly inconsistent with it, then the second contract is supplementary to the first, and the two will be construed together.

9 Cyc. L., p. 596.
Uhlig v. Barnum, 61 N. W. 749.

Certainly the first contract could have been construed with the second for the purpose of arriving at the items of material sold and the prices of the same. The parties had agreed upon these items and their value, and to this agreement the court would have looked for the purpose of the materialmen's lien, even if the contract of March 13, 1901, was an extinguishment of the first contract. The statement of this proposition is, we contend, so plainly the law, that it argues itself.

(c) Bringing an action for the price is such an election.
Richards v. Schreiber, 98 Iowa 422.
Marston v. Baldwin, 17 Mass. 611.
Smith v. Barber, 153 Ind. 322.
Dowagiac Mfg. Co. v. White Rock Lumber & Hardware Co., (S. Dak., 1904) 99 N. W. 854.

In the Iowa case the same claim was made as in this action, that it was brought by attorneys not fully advised of the facts and that it should not be treated as an election of remedies.

Perhaps a better rule in a case of this kind is that indicated by the Supreme Court of Hawaii in its opinion that even if an action for the price does not constitute an election, such an action accompanied by an attachment of the property is an estoppel by election on the theory that the attachment recognizes the title as being in the vendee, citing:

Crompton v. Beach, 62 Conn. 25.
Smith v. Barber, 153 Ind. 322.
Bailey v. Hervey, 135 Mass. 172.
Fuller v. Eanes, 108 Ala. 464; 19 So. 366.
Heller v. Elliot, 45 N. J. L. 564.
Button v. Trader, 75 Mich. 295.
Parke, etc., Co. v. White River, etc., Co., 101 Cal. 37.
Ormsby v. Dearborn, 116 Mass. 386.
Allbright v. Meredith, 58 Ohio St. 194.

(d) The presentation of the claim and intervention in the receivership is also a waiver.

The presentation of a claim against an estate, instead of retaking possession, is such a waiver.

Holt Mfg. Co. v. Ewing, ubi supra.

This case was decided upon the authority of *Ormsby v. Dearborn, ubi supra,* to the same effect, but the plaintiff sought to avoid his election on the ground that he did not know the real condition of the estate when he presented his claim and afterwards that it turned out that the claims largely exceeded the assets, but as there was nothing in the record tending to show that the plaintiff was misled by anyone as to the condition of the estate, the court overruled the point, which is the contention of the plaintiff in this case. He cannot now change his election. To this point that a party is bound by his election, we cite:

Butler v. Hildrith (Mass.), *ubi supra.*
Holden v. Metropolitan Nat. Bank, 151 Mass. 112; 23 N. E. 733.
Whiteside v. Brawley, 152 Mass. 133; 24 N. E. 1088.

The procedure of intervention was in accordance with the rules of law prevailing in receiverships, and when property is in the hands of a receiver this is an available remedy.

Fosdick v. Car Co., 99 U. S. 256, 25 L. ed. 344.
Central Trust Co. v. Tex. & Pac. Co., 23 Fed. 1673.

Mr. McClanahan testifies (Tr. p. 69): "We did not take this action in the first instance because we knew to take these rails back, if the property of the Kona Sugar Company, would mean the collapse of the company, and so filed the lien."

The testimony of McClanahan and the Bierces make it clear that they relied either on the materialman's lien or on the lien of the mortgage, and by intervention in the action procured authority to bring a mechanic's lien suit, and also sought to have it declared that the property should be sold subject to the lien of the mortgage on the ground that the mortgage secured its claim. The sale was made for the benefit of the mortgage and those claiming under it, but not subject to it as prayed for. The California case is authority to the point that having sought to establish their claim in that action they cannot now, because they think they can realize more money in another way, take an inconsistent position.

(e) The lien was waived by the conduct of the plaintiff with respect to the Receivership.

As is well said by the Alabama court, the lien is waived by any inequitable act. It is clearly inequitable conduct (whether or not any specific act in this case constitutes a waiver by the plaintiff,) to encourage the carrying on of the plantation under a receivership, to join in the proceedings, to file its claim of lien in order to retain a priority against the funds in the hands of the Receiver, (a claim which would be subordinate to the expenses of the Receivership,) and then after a year of unsuccessful operation when the property is sold to pay the expenses of the Receivership, to turn around and claim the property itself. We place this ground not on any specific act, but that plaintiff's whole conduct conclusively shows a waiver.

Hinchman v. Pt. Defiance Ry. Co., 14 Wash. 349; 44 Pac. 867.

Engine Co. v. Hall, 89 Ala. 630; 7 So. 187.

Irrespective of all the other considerations the delay in asserting the title under the circumstances is of itself a waiver.

Patten v. Smith, 5 Conn. 196.
Leatherbury v. Conner, 54 N. J. L. 172; 23 Aal. 684.
Gorham v. Holden, 79 Me. 317; 9 Atl. 894.
Owenby v. Swann (Tenn.), 59 S. W. 378.

III.

THE TRANSACTION CONSTRUED MOST STRONGLY IN FAVOR OF PLAINTIFF CONSTITUTES AT BEST A MORTGAGE AND NOT A CONDITIONAL SALE.

The rule laid down by innumerable cases is, that although the language of the instruments used in the transaction may be that of a conditional sale, if there is on the part of the buyer an unconditional promise to pay, the transaction will be considered an absolute sale with mortgage back and not a conditional sale.

In the case of *Herryford v. Davis, ubi supra,* Justice Strong says:

"Notwithstanding the efforts to cover up the real nature of the contract, its substance was an hypothecation of the cars to secure a debt due to the vendors for the price of a sale. The railroad company was not accorded an option to buy or not. They were bound to pay the price either by paying their notes or surrendering the property to be sold in order to make payment. This was in no sense a conditional sale; this giving of property as a security for the payment of a debt is the very essence of a mortgage, which has no existence in case of a conditional sale."

Andrews v. Colorado Savings Bank we have already cited. In *Hart v. Barney, ubi supra,* the court referring to the language used in *Herryford v. Davis, ubi supra,* says: "The court means by 'only a conditional sale' one that is really a conditional sale both to the buyer and seller, i. e. that the payment of the purchase money as well as the passing of the title is conditional. If, by the terms of the agreement, the purchaser becomes liable unconditionally for the purchase price, although by the agreement he may never get the title and ownership of the property, then the agreement is an evasion of the Registration Statute, as its purpose is simply to retain a secret lien."

Later on the learned judge says: "This provision makes the buyer bound unconditionally for the purchase price even though he never gets the title and ownership of the property. Is not this conclusive evidence that the agreement, while it evidences a conditional sale is merely a device to retain a secret and unrecorded lien on the property sold."

In *Dowdell v. Umpire Furniture & Lumber Co.*, 84 Ala. 316: 4 So. 31, the plaintiff delivered certain goods, taking in payment therefor three notes, with an oral agreement that the title to the goods should remain in the plaintiff until the notes were paid. Judge Clopton says:

> "The instrument possesses the essential elements and charasteristics features of a mortgage. A continuing liability for the purchase price, after the failure to perform the condition and the vendor has acquired possession of the property, is wholly inconsistent with the character of a conditional sale. The notes of B & Co. belong to the plaintiff which they had a right, by the terms of the contract, to retain though they might take possession of the goods. Claiming both the furniture and the notes as their property under the agreement is a claim of antagonistic rights unless the instrument operates as a mortgage. *Herryford v. Davis, ubi supra; Hart v. Barney, ubi supra.* The construction and legal effect of the instrument is that the retention of title was intended as security for an absolute debt contracted for the price of the furniture. It operates as a chattel mortgage."

In *Chicago Ry. v. Merchants' Bank, ubi supra,* notes were given by the vendee to the vendor in payment of certain cars sold to vendee under an agreement by which title was to be retained by the vendor until the notes were fully paid. The court (Harlan Justice), rendering the decision, held that this agreement could not be considered a conditional sale: the vendee having absolutely promised to pay the notes and must, therefore, be considered an absolute sale with a mortgage back.

Osborne v. Connor, 4 Kan. App. 609: 45 Pac. 327. The plaintiff sold and delivered to the defendant a binder, defendant executing and delivering to plaintiff several promissory notes, together with an agreement that the title to the binder should remain in the plaintiff until the notes were all paid, and if the notes were not paid the plaintiff could seize and sell the machine and apply the proceeds to the notes.

Clark, J., says:

"That while the clause set out in the notes, with reference to the retention of title, the ownership and right of possession of the property in the payee until full payment of the purchase price had been made, would indicate that a conditional sale was intended, we think the other provisions of the notes evidenced an absolute sale of the binder with a retention of the title and right of possession only by way of security for the payment of the purchase price, and that the agreement for such retention was, in effect, a short form of chattel mortgage."

In the case at bar it will be seen that not only were notes given for the entire price of the railway materials furnished by the Plaintiff-Appellee, but also these notes were secured by bonds of the Kona Sugar Company, secured by mortgage on this and other property. It was made a specific part of the agreement that these notes should be so secured: the notes themselves were negotiable and at one time were endorsed over to third parties. Add to this the testimony of W. W. Bierce, the president of the Plaintiff-Appellee, that he took a stipulation that title to the goods should remain in the Bierce Company as a *further security for the payment of the notes,* and there is not a case in the reports as strong as the present one in every element which would make the court declare the transaction to be an absolute sale with a mortgage back, either by virtue of the bonds or this agreement. Furthermore, the conduct of the Plaintiff was entirely consistent with such an intention. The Plaintiff's testimony is that in order to make their notes good they were desirous of having the Kona Sugar Company continue in business. No such desire could exist if the sale had been considered purely a conditional sale by the parties. Furthermore, the goods were placed and were intended to be placed upon the freehold of others, where the Plaintiff must have known it would be impossible for the Kona Sugar Company to themselves revoke the transaction.

We, therefore, contend that not only do the courts lean most strongly toward calling every case of conditional sale, an absolute sale, with mortgage back, but that this particular case is most strongly and evidently, both by the intention of the parties and the construction of the law, an absolute sale. The very idea of an absolute promise to pay, coupled with a right existing in behalf of the payee of the notes to retake the property without extinguishing thereby the obligations of the notes is, as the courts most frequently say repugnant to the very essence of a conditional sale, which is that the vendee as well as the vendor, shall have the right under certain conditions to revoke the entire transaction.

IV.

THE PLAINTIFF CANNOT MAINTAIN THIS ACTION SINCE ITS INTERVENTION IN THE ORIGINAL ACTION WAS EITHER PENDING OR HAD BEEN DECIDED AGAINST IT.

This intervention dated February 12th, 1903, and filed March 20th (Trans. pp. 211-219) sought the ascertainment of the amount due on the promissory note, that it be decreed that the receiver, the Kona Sugar Company, Limited, or any third person should pay the amount, or upon failure thereof to deliver the engines, cars and other railroad equipment to the plaintiff upon the surrender of the promissory note and all the collateral securities. The order of sale made April 20th, 1903, has the effect of adjudicating this petition adversely to plaintiff, since that order directed the sale of the railroad equipment, locomotives and cars free and clear of all liens or incumbrances. The plaintiff duly appealed from this order of sale and also from its confirmation, and the court said in its opinion upon the appeal from the order of sale that there was no evidence in the record that the plaintiff had any title to the property. (16 Haw. 260.)

If the plaintiff had shown title the amount found might have been awarded to it out of the proceeds of the sale.

Fosdick v. Car Company, 99 U. S. 256; 25 L. ed. 344.

In that case although the Chief Justice says that the restoration of the cars might have been decreed, it is clear that he means restoration before the sale, as restoration after the sale would be at the expense of the purchaser, whereas the payment of their value out of the funds is at the expense of the seller.

V.

THERE BEING NO STATEMENT OF FACTS IT MUST BE ASSUMED THAT THE EVIDENCE SUPPORTS THE JUDGMENT.

If this cause is properly before the Supreme Court, and the order of this court allowing the appeal is at least a *prima facie* adjudication, that the procedure is under the Act of April 7, 1874, and that as to appeals brought to this court on the ground that more than Five Thousand Dollars ($5,000) is involved in the judgment the procedure should not be that provided in the Organic Act, but by the general act in reference to territories referred to, then we submit that there is in the record no sufficient statement of facts in the nature of a special verdict under the Act of Congress of April 7, 1874, and the judgment must be affirmed.

> *Marshall v. Bertis,* 172 U. S. 630; 43 L. ed. 579.
> *Cohn v. Daley,* 174 U. S. 539; 43 L. ed. 1077.

The findings of the Circuit Court are not sufficient because these findings were reversed by the Supreme Court which arrived at a different conclusion, in large part reached from facts not found or passed upon by the Circuit Court. Again, the order modifying the decision and the direction to enter judgment and the judgment (Trans. pp. 319-320) which was entered at the request of the plaintiff, was based on these facts and a new fact, not in the record, namely, that the plaintiff has no further evidence to offer on the question of election which would make it worth while to have a new trial. It cannot be that the findings of fact of the Circuit Court on which it found judgment for the plaintiff are to be considered as a statement of facts upon which the Supreme Court ordered judgment for the defendant.

We respectfully submit that the judgment of the Supreme Court of Hawaii should be affirmed.

A. B. BROWNE,
ALEX. BRITTON,
JOHN W. CATHCART,
WILLIAM R. CASTLE,
DAVID L. WITHINGTON,
For Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 212.

THE WILLIAM W. BIERCE COMPANY, LIMITED,
A CORPORATION, APPELLANT,

vs.

CLINTON J. HUTCHINS, TRUSTEE, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

REPLY BRIEF FOR APPELLEE.

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IN THE

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No. 212.

THE WILLIAM W. BIERCE COMPANY, LIMITED, a Corporation, Appellant,

vs.

CLINTON J. HUTCHINS, Trustee, Appellee.

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REPLY BRIEF FOR APPELLEE.

I.

The Findings of the Trial Court Were Reversed by the Supreme Court.

Thus, finding 6 (R., 267) was—

> "That the contract of March 13th, 1901, was an entire contract, and intended so to be, for a lump sum consideration, which consideration was incapable of being apportioned so as to make possible the ascertainment of the price of the lienable and non-lienable items thereof."

The Supreme Court in its opinion expressly hold the contrary, saying (R., 298):

> "but, in our opinion, the contract in the present case is not such as to prevent a severance of the price of the lienable items from the price of the non-lienable items."

And the court proceeds to fully discuss that proposition.

Again, finding 4 (R., 267) asserts that the payment of $10,000 cash, under the contract of March 13, 1901, and the giving of the note for $37,044.53, secured by the bonds of the Kona Sugar Company, Ltd., was in settlement of the previous contract of February 21, 1900,

> "and said cash and said note and bonds were not given nor were they intended as the consideration for the purchase price of the materials sued for."

The opinion of the Supreme Court (R., 298) plainly expresses its understanding to the contrary by saying:

> "The total amount, including the cash and the note under this arrangement, was $47,044.53. The aggregate amounts under the first arrangement, it is said, would be about $45,000. Probably the difference between these two amounts covered expenses that had occurred meanwhile for storage or otherwise. The first of these contracts is made a portion of the second by express reference. They must be construed together. The first shows that the price for at least a portion of the lienable materials may be ascertained."

Finding 7 is:

> "That by entering into the contract of March 13th, 1901, the contract of February 21st, 1900, was intended to be settled and adjusted."

But the opinion of the Supreme Court (R., 298, and in full accord with the plaintiff's original pleadings) treats the contract of March 13, 1901, as a "supplementary contract," and further holds, as noted above, that "they must be construed together."

Findings 11, 12, and 13 relate to the matter of election, and on which the Supreme Court's original opinion was based, with resulting reversal.

Findings 8 and 9 (R., 268) hold the contract of March 13, 1901, a conditional sale, and not a chattel mortgage or absolute sale, with lien reversed in the vendor. Yet, in the opinion of the Supreme Court on rehearing, it was expressly said (R., 306-307):

> "For the purposes of the original decision it was assumed that the contract was one of conditional sale or, perhaps more accurately speaking, that it was an executory contract to sell upon condition precedent. We will proceed upon that presumption for the purposes of the present decision also, although it may not be out of place to state that in the opinion of a majority of the court the sale was absolute and therefore replevin could not be maintained in any event."

There were forty-six separate exceptions brought before the Supreme Court of Hawaii (R., 235). They are sufficiently described for present purposes by the index to the Record, thus:

> "Defendant's exception I to ruling of Circuit Court granting leave to plaintiff to amend its complaint.
>
> "Defendant's exceptions II-XVI to rulings of Circuit Court on admission and rejection of evidence.
>
> "Defendant's exception XVII to ruling of Circuit Court on question of election, etc.
>
> "Defendant's exception XVIII to finding and judgment of Circuit Court.
>
> "Defendant's exceptions XIX-XXXIV to findings of fact by Circuit Court.
>
> "Defendant's exceptions XXXV-XLII to conclusions of law by Circuit Court.
>
> "Defendant's exception XLIII to decision of Circuit Court.

> "Defendant's exceptions XLIV-XLV to entry of judgment by Circuit Court.
>
> "Defendant's exception XLVI to ruling of Circuit Court denying defendant's motion for a new trial."

In its original opinion (R., 293) the Supreme Court opens by saying:

> "This is an action for replevin of certain rails, cars, locomotives, equipments and materials of a railroad on the plantation of the Kona Sugar Co., Ltd., all of the property of which company had been purchased by the defendant at a receiver's sale. The plaintiff had delivered this railroad property to the company under an agreement claimed by the plaintiff to be a conditional sale, and so held by the trial judge who heard the case, jury waived, and rendered judgment for the return of the property and $1,030 damages and an alternate judgment for $22,000 in case the property should not be returned. The case is brought here by the defendant upon numerous exceptions. It has been argued and briefed at considerable length upon many points, but, in the view that we take, it will be sufficient to decide the single point as to whether the plaintiff is estopped from bringing this action of replevin, based on the theory that the title to the property is in itself for the reason that it had previously elected to pursue an inconsistent remedy, namely, by bringing an action for the price of the property and to enforce a material man's lien for the same, on the theory that the title to the property had passed to the vendee, the Kona Sugar Company."

The opinion concludes (R., 299) that, as the facts are undisputed upon the question of election as thus ruled by the court, "under such circumstances this court may reverse *the "findings and judgment* of the trial court, and it does so in this case."

Adding:

> "The exceptions, so far as they raise the question of election, are sustained, the judgment of the trial

> court is reversed and the case is remanded to that court for such further proceedings as may be proper."

This was all-sufficient and would necessarily result in a new trial.

After the rehearing and decision thereon, however, and upon the plaintiff's own motion (R., 315-316) the court modified its order so as to provide that the judgment below "is hereby reversed and the exceptions, in so far as they raise the question of election are sustained, and the said cause is hereby remanded to the said circuit court with direction to dismiss the plaintiff's petition with costs."

From the foregoing, it is evident that the court in no manner sustained the findings of the trial court, and did not pass upon any of the numerous exceptions raised thereto, because, as expressly stated in its original decision, there was no need of so doing, inasmuch as on the question of election the court below had erred, and the judgment must accordingly be reversed and remanded on the exceptions raising that question for new trial. Such reserval necessarily put the matter at large, for it vacated the judgment entered at the first trial. When these appellants, on their own motion, asked for a full and final judgment, they certainly cannot be heard to say that the effect of the judgment so entered was an express approval of all other findings (or indeed of any finding of the court below) by the Supreme Court.

Now, this general judgment for the defendant is here for review, and it is plain the Supreme Court did not affirm any of the findings of the trial court. It is manifest that there is, in no form in this case, *any* statement of the facts such as is required by the Practice Act and the proper procedure thereunder, as repeatedly held by this court.

The judgment for defendant is here for review. The opinions below simply enlighten this court as to the grounds on which the judgment was based, but such judgment may be founded on a wrong reason, although from a full and proper statement of the case, as required by the Practice Act, it may be obvious, nevertheless, that the judgment itself was right. Hence the necessity for such statement of facts, which will enable this court to determine whether, upon the facts thus stated, the judgment was correctly rendered. It will be noted, as recited in the opening paragraph of the original opinion of the Supreme Court, that numerous exceptions were argued, but that the court did not rule thereon either way, resting its judgment of reversal, in the first instance, upon the matter of election.

The failure or refusal of the Supreme Court to make the statement of facts required certainly cannot operate to the prejudice of the appellee. With the reversal of the findings and with no statement of the facts certified here to this court by the Supreme Court of Hawaii in any form, final action here now could result only in the affirmance of the judgment.

This is in precise accord with the rule announced in *Gray v. Howe* (108 U. S., 12), well stated by the syllabus as follows:

> "Where the Supreme Court of a Territory on appeal reverses the judgment of a district court and sets aside findings of fact, and makes no new statement of facts in the nature of a special verdict, the judgment of the Supreme Court of the Territory must be affirmed on appeal."

And the rule is stated with admirable clearness in *Hecht v. Boughton* (105 U. S., 235, 236) thus:

> "We are not to consider the testimony in any case. Upon a writ of error we are confined to the bill of exceptions or questions of law otherwise presented by the record; *and upon an appeal to the statement of fact and rulings certified by the court below.* The *facts set forth in the statement which must come up with the appeal are conclusive on us.* Under these circumstances, the form of proceeding to get a re-

> view is not of so much importance as certainty about what is to be done."

Citing *Stringfellow v. Cain* (99 U. S., 610), wherein (pp. 613-614) this court said:

> "Under this act, if the findings of the district court are sustained by the Supreme Court and a general judgment of affirmance rendered, the findings of the district court, thus approved by the Supreme Court, will furnish a 'statement of the facts of the case,' for the purposes of an appeal to this court. The same will be true if there is a reversal, for the reason that the facts as found are not sufficient to support the judgment. But if, as in this case, the judgment is reversed because the evidence does not sustain the findings, other findings must be made before the case can be put in a condition for hearing in this court on appeal."

This is precisely the situation here. Plainly the findings and judgment are reversed, and as plainly there is no "statement of facts and rulings certified by the court below."

The same rule is reaffirmed in *Salina Stock Company v. Salina Creek Company* (163 U. S., 109, 117-118).

Marshall v. Burtis, 172 U. S., 630.

Cohn v. Daley, 174 U. S., 539.

II.

The Original Lien Was Filed and Pursued with Full Authority and Full Knowledge.

A. W. W. Bierce, President of the company since its organization, in December, 1899, states (R., 77) that—

> "Messrs. McKinney and McClanahan were the attorneys in fact of the corporation and had been since some time in 1901—about March 13, 1901."

McClanahan testifies that the matter had been left entirely with his firm (R., 98).

> "Q. To take such action and steps as you saw fit and proper in the premises?
> "A. Absolutely, absolutely.
> "Q. The lien was filed when?
> "A. The lien was filed three days before the committee's agreement was entered into, on May 12, 1902."

The motive for filing the lien appears from the witness' statement that (R., 96)—

> "When we filed this lien there was a certain provision in this creditors' contract which provided for a priority of payment of claims, and lienholders were preferred over certain other holders."

Again (R., 98) he says:

> "Q. The lien was filed when?
> "A. The lien was filed three days before the committee's agreement was entered into, on May 12th, 1902.
> "Q. Three days before what?
> "A. Notice of lien was filed three days before the date of the agreement among the creditors, which was dated May 15th, 1902. That would make the lien having been filed on May 12th, the notice of lien on May 12th, 1902. On August 1st, 1902, suit was brought. * * * Lien suit was brought on the first of August, 1902, discontinued on the 25th of January, 1903, at a time when things were chaos and everybody given up; in fact the bondholders had determined to write their bonds off at that time, absolutely total loss."

November 24, 1902, petition for intervention in the receiver's suit was filed by the Bierce Company (R., 257-265). In that petition the original contract between these parties, of February 21, 1900, was plead, paragraph IV of the petition averring:

> "That under and by virtue of SAID CONTRACT this intervenor furnished to the said Kona Sugar Company, Ltd., in accordance with the terms of said contract and at the price agreed upon in said contract, certain goods, merchandise and materials, which by the terms of said contract this intervenor was obliged to furnish to the said Kona Sugar Company, Ltd."

And by paragraph V it was averred that the materials thus furnished would be used, and in fact were used, by the Sugar Company "in the construction and equipment of a certain railroad located on the plantation of the said Kona Sugar Company, Ltd.," etc.

Paragraphs VI and VII set forth the filing of the notice of lien on May 14, 1902; the bringing of suit on August 1, 1902, "for the purpose of enforcing said lien upon the property hereinabove and in the notice of lien demanded; that said suit is still pending and undetermined," etc.

By paragraph VIII it was averred that the Bierce Company "is the holder and owner" of $45,000 worth of the first-mortgage bonds of said Kona Sugar Company, "*which said bonds are secured by a mortgage upon all of the property of the said Sugar Company, Ltd., including that property herein below, in paragraphs XI and XII of this petition and intervention, more fully referred to and described.*"

Paragraphs IX, X, XI, and XII then recite the decree in the receivership cause (wherein the petition under discussion was filed) for the *sale* of the property of the Kona Sugar Company, expressly including the railroad and equipment and all the property of every kind of the Kona Sugar Company by detailed description.

Paragraph XIII then avers:

> "That each and all of said property thus decreed by the said court to be sold as aforesaid, and advertised by the said F. L. Dortch, as receiver of the Kona Sugar Co., Ltd., to be sold in the manner and form above set forth, *is the same property which was conveyed by mortgage to secure to this intervenor,*

> *amongst others, the payment of the bonds hereinabove more specifically set forth as being now held by the intervenor herein."*

And paragraph XIV thereon prays, in terms and at length, a modification of the decree of sale in the various parts thereof where such modification was essential, so that it would read (R., 263):

> "Saving and excepting from said sale and from the operations thereof all liens, rights, claims and interests as hereinabove set forth."

In short, the decree, through four separate subdivisions under paragraph XIV, specifically prayed such amendment of the decree of sale as would by repeated expression make it absolutely clear that the sale was made saving and excepting therefrom and from the operation thereof—

> "all liens, rights, claims and interests of whatsoever name or nature of all bondholders, and of all persons claiming, asserting, or seeking to enforce any lien of whatsoever name or nature, in, to, or against the aforesaid property or any part thereof" (R., 262-263).

No action appears to have been taken on this petition, although noticed for hearing November 24, 1902 (R., 256).

The appellant here, by this recital of paragraph XIII of the petition, however, distinctly pleads that this property was covered by the mortgage on which the bonds held by it *and others* was secured. The case, therefore, is wholly within the facts and conclusion thereon announced by this court in *Van Winkle v. Crowell* (146 U. S., 42), which was an action in replevin, and wherein this court (Op., 51) said:

> "Moreover, it is shown that, prior to the commencement of the present suit, the plaintiffs, in May 1886, filed a mechanics' lien as respected the ma-

> chinery made under the contract of March 28, 1885, admitting a credit for the $2,500. and the $500., and claiming a lien under said contract and under the three notes of December 11, 1885; and in July, 1886, they commenced a suit in the court of the State of Alabama to enforce that lien; and that that suit was dismissed by the plaintiffs without a trial on the merits, before the trial of the present suit was had. *The assertion of that lien treated the property as the property of Belser and Parker, and did so after the notes of December 11, 1885, were taken.* It was inconsistent with the existence in the plaintiffs of a title to the property. It treated the sale of the property to Belser and Parker as unconditional."

February 3, 1903, the Bierce Company petitioned for leave to bring a statutory action of replevin against the receiver, which petition was denied by the Circuit Court (R., 210) on the ground that notice to the trustee under the mortgage and other parties who had filed material men's liens should be given. The court concluded:

> "The mere fact of granting the motion is sufficient to divest the receiver of the possession of the property and to vest the possession of the same in the plaintiff—nor is the fact that the plaintiff tendered a bond to the Kona Sugar Company, Ltd., sufficient to warrant an *ex parte* proceeding in the premises. As the said parties appear not to have had notice of the said motion and the hearing, the said motion is denied."

The order is dated February 5, 1903.

Thereupon, about February 26, 1903, the Bierce Company filed a petition in intervention, setting up for the first time (R., 215, paragraph XIII) "*a supplemental contract in writing*" of March 13, 1901, describing the property delivered and claiming title for the first time under the theory of conditional sale, and praying (R., 218) ascertainment of amount due the Bierce Company and decree that same should be paid by the receiver "within a short day to be fixed by this court in said decree" (meaning the foreclosure decree); or, "upon the failure to pay within the short day fixed as aforesaid, deliver the said engines, cars and other railroad equipment and each and every portion thereof, as set forth in paragraph XIV of this petition, to your petitioner," and upon delivery, in turn, by petitioner of the promissory note of the Kona Sugar Company and all collateral security held by petitioner thereunder.

This petition was allowed on motion to be filed by the court and the receiver allowed to be made a party (R., 202 and 208). The attorney-in-fact for the Bierce Company (McClanahan) states (R., 99), concerning this petition, that—

> "Our suit in intervention was in the nature of an equitable replevin, which was filed after we had been denied the right to bring legal replevin against the receiver. We petitioned to be allowed to intervene for the purpose of bringing equitable replevin against the receivers."

With this petition pending and on April 20, 1903, (R., 220-224) "decree and order of sale of all the estate and property of the Kona Sugar Company, Ltd.," was entered.

On June 1, 1903, the same court entered an "order confirming same" (R., 225).

From the order of April 20, 1903, directing the sale and prescribing the terms thereof, the Bierce Company took out a writ of error to the Supreme Court of the Territory (R., 227, 228), setting forth therein its petition in intervention of February 26, 1903, "for the recovery of certain specific property" in the hands of said F. L. Dortch, as receiver of the said Kona Sugar Company, Ltd., giving notice to all of the defendants in error thereof, and that—

> "a writ of error in the above-entitled cause has issued from the Supreme Court of the Territory of Hawaii

> to the Circuit Court of the Third Judicial Circuit of said Territory, sitting at chambers as a court of equity" (Rec., 229-230),

together with full assignment of errors setting out at length the decree and order of April 20, 1903, and specifying, among other errors, the inclusion in said decree and proposed offering for sale thereunder of the goods, chattels, and effects in the possession and under the control of the receiver, "which were the subject-matter of plaintiff in error's suit in intervention filed in said court on the 26th day of February, 1903, to wit," and specifically describing the rails, equipment, etc., as set forth in said petition.

This writ of error was brought on August 25, 1903; was duly allowed and was duly served, and the decree below affirmed (16 Haw., 258). All of this proceeding for the writ of error is *subsequent* to the filing of this replevin suit, which was begun against the purchaser at the foreclosure sale (Hutchins, trustee and appellee here) on *July 20, 1903,* followed by attachment of the property described in the complaint therein and execution of return bond on July 21, 1903 (R., 37-49).

The original complaint set up the contract of February 21, 1900, under which the material was purchased and described the contract of March 13, 1901, as "a supplementary contract in writing," these words being by an amendment (R., 51) stricken from the complaint, although the same words are used in the petition of February, 1903 (R., 215, paragraph XIII).

The answer of defendant Hutchins, trustee (R., 49), admits his purchase under the foreclosure decree in the receivership suit, which was, "on or about the 9th day of ——, 1903, sold to this defendant *free and clear of all encumbrances.*"

The answer affirmatively pleads that the property was the property of the Kona Sugar Company and "was part of the assets then and there sold to this defendant;" and also *denies*, "except as hereinbefore admitted, qualified, or alleged," the truth of the facts stated in the complaint.

Notice read at sale under decree of foreclosure (R., 179), Exhibit A to testimony of Alex. Lindsay, Jr., as read by him thereat, viz, May 9, 1903.

This notice states, with description of the property:

(1) That the Bierce Company is the owner "of the following articles of railroad equipment at the present time being used on the plantation of the Kona Sugar Company, Ltd., as a plantation railroad." (Here follows description of the rails, spikes, engines, cars, etc.)

(2) That such articles are merely temporarily and wrongfully in the possession of the Kona Company and the receiver.

(3) "The said Wm. W. Bierce Co., Ltd., has taken and is now prosecuting legal measures against the Kona Sugar Company, Ltd., F. L. Dortch, the receiver of said company, and other interested parties, to regain the said property above described and all portions thereof.

(4) That the Kona Sugar Company and the receiver have no right to or interest therein, and any purchaser at the sale of the property of the Kona Sugar Company, Ltd., "will obtain no title therein or thereto or in or to any part thereof."

(5) That said company protests against the sale of said articles "or any part thereof" and gives notice that it will at once taken legal steps to regain possession of said property from any person or persons who shall take or attempt to take possession thereof or "to exercise or claim any right, title or interest of any sort therein or thereto."

Hutchins became a purchaser at the sale, as trustee for the creditors. It should be remembered that, from the time of the purchase and delivery of this material and equipment to the Kona Company, it had been put into necessary use as part of the sugar plantation (to wit, in 1901). Down to January, 1903, the constant and consistent claim upon the record and the attitude of the appellant was that title had passed by the delivery of this material to the Kona Company, and the appellant had sought (1) by lien filed in May, 1902, followed by suit in August, 1902, to assert a lien against the entire property into which it had been merged by construction of railroad and use of equipment, and (2) by its petition filed in the receivership suit in November, 1902, so expressly admitting; asserted its then interest as the holder of bonds secured by a mortgage, which by the express terms of said petition *admittedly covered this identical property,* and (3) prayed that the decree for sale and sale thereunder should be made, saving all liens, including, of course, its own. By the lien and suit thereunder and the petition of November, 1902, it therefore stated the *legal effect* which it ascribed to the original contract of February, 1900, and the supplementary agreement of March, 1901. All other general creditors and all bondholders had therefore distinct notice during all that period of the exact status taken by this appellant; of its full pleading, showing by clear intention its acquiescence in the ownership and possession by the Kona Sugar Company and its receiver of this material and property, and its assertion of a due claim of protection thereto, 1st, by the lien, and, 2d, as a holder of the mortgage bonds, which its own petition and pleadings in terms declared covered this identical property.

With the case in this attitude when the decree for final sale was passed, it is manifest that the general creditors and other bondholders were entitled to rely upon the facts thus solemnly plead by the appellant, and the legal position which it had, both in the lien suit at law and by its petition in the foreclosure suit in equity, consistently and fully taken. Certainly estoppel by formal pleading, if applicable in any case, is so applicable here. A party cannot blow hot and cold. Certainly this appellant could not take twice over the same position, and by its procedure in court, both at law and in equity, declare the property to belong to the Kona Company and rightfully to be sold under the decree of foreclosure, but with saving of the lien asserted thereto in its favor, and afterward abandon such pleading and admission. The lien went to an appropriation *pro tanto* of the proceeds of the sale; the property was thus offered as a going concern, with the railroad and its equipment an integral and most essential part of this sugar plantation. *Now,* by the replevin proceeding, the appellant seeks to take away the property itself from the purchaser, who, as trustee, represented the general creditors, and despoil the estate, with consequent large destruction of its value, by such retaking.

By enforcement of the lien the proceeds of sale would have been diminished *pro tanto* and the appellants would have been thereby paid out of the fund derived from the sale; but the proceeding in replevin would result in taking the property thus sold away from the purchaser, to the loss and injury of the general creditors, who had become such, relying upon the lien, record, etc., made by the appellants, and hence manifestly to their most serious injury. It is plain that the effect of the replevin suit is to the direct injury of the general creditors, purchasers at foreclosure sale. They necessarily stand in the shoes of the Kona Company and its receiver; they take whatever rights the Kona Company and the receiver had. Certainly the receiver, as representing both the company and all the creditors (for whom he was in fact trustee), had the right to rely upon the full legal effect of the lien and suit thereunder and the record declaration of the appellants that they claimed both under the lien and as bondholders under the mortgage which their petition of November, 1902, expressly declared covered this property. The purchasers at such foreclosure sale, although representing the general creditors, as well as the general creditors themselves, have the right to the same protection which the receiver had in respect of these proceedings.

The property did not sell at foreclosure for sufficient sum to reimburse the receiver and his expenses. The general creditors and bondholders lost *all*. The appellant had received $10,000 and now seeks to recover the material delivered or its equivalent value.

Respectfully submitted,

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October Term, 1906.

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WILLIAM W. BIERCE, LIMITED, a Corporation, Appellant,

vs.

CLINTON J. HUTCHINS, Trustee.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

PETITION FOR REHEARING.

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CLINTON J. HUTCHINS, TRUSTEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

PETITION FOR REHEARING.

Rehearing herein is respectfully prayed upon grounds not in the understanding of counsel covered by the present decision, to-wit:

1. Neither the original contract of February 21, 1900 (R., 145-150), nor the "supplementary" contract of March 13, 1901 (R., 43), were recorded. The transaction was wholly between the appellant and the Kona Sugar Co.

2. The delivery made under the second contract was followed by the actual incorporation of the material—rails,

equipment, &c.—upon the Kona Company's Sugar plantation and hence made part thereof.

3. First-mortgage bonds of the Kona Company were required and taken by appellant as security, "said bonds being portion of a duly authorized issue not exceeding $200,000," and as expressly recited in the agreement of March 13, 1901 (R., 43).

4. Appellant's petition, filed on November 24, 1902, in the receivership proceedings, averred (R., 258):

a. That under the contract of February 21, 1900, appellant "furnished to" the Kona Company "certain goods, " merchandise, and materials, which by the terms of said " contract this intervenor was obliged to furnish to the said " Kona Sugar Co., Ltd."

b. And by paragraph V it was averred that the materials thus furnished would be used, and in fact were used, by the sugar company "in the construction and equipment of a certain railroad located on the plantation of the said Kona Sugar Company, Ltd.," etc.

c. By paragraph VIII (R., 260) it was averred that the Bierce Company "is the holder and owner" of $45,000 worth of the first-mortgage bonds of said Kona Sugar Company, *"which said bonds are secured by a mortgage upon all of the property of the said Sugar Company, Ltd., including that property herein below, in paragraphs XI and XII of this petition and intervention, more fully referred to and described."* The property thus referred to included *eo nomine* the railroad property and equipment here in suit.

Paragraph XIII then avers (R., 262):

> "That each and all of said property thus decreed by the said court to be sold as aforesaid, and advertised by the said F. L. Dortch, as receiver of the Kona Sugar Co., Ltd., to be sold in the manner and form above set forth, *is the same property which was conveyed by mortgage to secure to this intervenor,*

> *amongst others, the payment of the bonds hereinabove more specifically set forth as being now held by the intervenor herein."*

And the prayer was that the order for sale of the Kona Company's property be modified by "saving and excepting " from said sale, and from the operation thereof, all liens, " rights, claims and interests of whatsoever name or nature " of all bondholders, and of all persons claiming, asserting, " or seeking to enforce any lien of whatsoever name or nature, in, to, or against the aforesaid property or any part " thereof." * * * (R., 263.)

5. The appellant's petition of February 13, 1903 (R., 211-219), filed *after* dismissal of its lien suit, and praying recognition of its "Equitable replevin" to recover the same property, does not retract the statements made in its sworn petition of November, 1902, *supra,* declaring that this property was covered by the mortgage and bonds whereof it was part owner and holder.

We submit it must hence result:

I.

The appellant took inconsistent positions, to the manifest prejudice of its co-bondholders; and

II.

Its notice, given at the sale of the Kona Company's property in the receivership proceedings, that it *then* claimed and was seeking to replevin the same property which by its petition of November, 1902, it expressly admitted *was* covered by the mortgage given to secure the bonds, necessarily had the effect to lessen the selling value of the property, to the manifest resulting injury of the bondholders.

Assuming that appellant was not *required* to so plead that the property in suit was in fact covered by the mortgage securing the Kona Company's bonded indebtedness, it is plain that it *did* so voluntarily plead such facts as *true;* that by an order of sale theretofore entered, the property was offered at public auction on December 4, 1902, "subject to all liens "of every kind and nature upon said property at the date of "said receiver's appointment," and again on December 15, 1902, but without bidders therefor (R., 220, 221); whereupon, by order of April 20, 1903, the property was offered and sold "as one parcel, all of the property real, personal and "mixed, and rights, privileges, immunities, and franchises of "said company, *free and clear of all liens and incumbrances*" (R., 223, 225). In this offering and sale the bondholders had active interest, for by its terms their interests were included therein. When, then, at *that* sale preliminary notice was given by appellant that it claimed and would replevin the railroad and equipment of the plantation, which property was a vital part of the plantation and without which the property could not be run and would hence be practically valueless, the certain effect was to greatly depreciate and injure the selling value of the plantation, which was in fact and necessarily offered as a whole, including the railroad and equipment. Two efforts had been made to sell the property subject to all liens existing at the date of the receiver's appointment. Such form of sale would have left the bondholders' lien intact. But those efforts failed. Meantime appellant intervened in November, 1902, solemnly pleading that the bondholders' mortgage *did* cover this railroad property. Sale "free and clear of all liens and incumbrances" was hence compelled. When the sale was had, however, this appellant shifted its position, and by its notice of replevin thereat destroyed in large degree the selling value of the property. Small wonder that it was hence sold for less than the receivership obligations. The former experience made that result practically certain. Should the appellant now be heard to say that its changed and inconsistent position injured no one?

In *Davis v. Wakelee*, 156 U. S., 680, 689, it was held:

> "It may be laid down as a general proposition, "that where a party assumes a certain position in a "legal proceeding, and succeeds in maintaining that "position, he may not thereafter, simply because his "interests have changed, assume a contrary position, "especially if it be to the prejudice of the party who "has acquiesced in the position formerly taken by "him."

And the decision continues (p. 690):

> "So in *Railroad Company v. McCarthy*, 96 U. S., "258, 267, it appeared that defendant proved on the "trial in the court below that it was impossible to "forward certain cattle on Sunday for want of cars, "and it was held to be fairly presumed that no other "reason was given for the refusal at that time, and "that the railway company could not, in this court, "set up the illegality of such a shipment on the "Sabbath, under the Sunday law of West Virginia. "In delivering the opinion of the court, Mr. Justice "Swayne says: 'Where a party gives a reason for "'his conduct and decision touching anything in-"'volved in a controversy, he cannot after the litiga-"'tion has begun, change his ground, and put his "'conduct upon another and different consideration. "'He is not permitted thus to mend his hold.' To "the same effect are *Railroad Co. v. National Bank*, "102 U. S., 14; *Daniels v. Tearney*, 102 U. S., 415, "421; *Everett v. Saltus*, 15 Wend., 474; *Holbrook* "*v. Wight*, 24 Wend., 169; *Winter v. Coit*, 7 N. Y., "288; *Mills v. Hoffman*, 92 N. Y., 181; *Wood v.* "*Seely*, 32 N. Y., 105; *Ellis v. White*, 61 Iowa, 243; "*Test v. Larsh*, 76 Indiana, 452."

So here we respectfully submit the appellant should not be permitted to shift its ground or to "mend his hold" when by its voluntary conduct, expressed in solemn pleading, it had declared the lien of the mortgage did, in fact, cover this property, and then seek to defeat the lien it has thus chosen to so deliberately affirm, for the purchaser—the appellee here—stands in the shoes of the bondholders and is entitled to receive the same protection which by the appellant's conduct accrued to them.

Respectfully submitted,

A. B. Browne,
Alex. Britton,
John W. Cathcart,
William R. Castle,
David L. Withington,
Attorneys for Appellee.

Counsel with deep respect, certify that the foregoing petition is not interposed for delay, and further certify their belief that the same is well founded in law.

Aldis B. Browne,
Alexander Britton,
Of Counsel for Appellee.

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Supreme Court of the United States.

No. 212.—October Term, 1906.

William W. Bierce, Limited, a corporation,
Appellant,
vs.
Clinton J. Hutchins, Trustee.

Appeal from the Supreme
Court of the Territory of
Hawaii.

[April 8, 1907.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a decision upon a bill of exceptions in a case tried by the court of first instance without a jury. *Hecht* v. *Boughton*, 105 U. S. 235. The facts were found by the trial court and certain conclusions of law were stated, which the Supreme Court of the Territory held to be wrong. It sustained the exceptions upon one point which went to the root of the plaintiff's cause of action, and, upon the plaintiff's motion coupled with a statement that it would have no further evidence to present at a second trial, ordered a judgment for the defendant, in order that the case might be brought to this Court. The findings of fact were taken to be true by the Supreme Court and are not open to dispute, except so far as they depend upon rulings of law, so that the questions for decision here are definite and plain, and there is no need to send the case back for a statement of facts by the Supreme Court, although one should have been made. *Stringfellow* v. *Cain*, 98 U. S. 610. *Harrison* v. *Perea*, 168 U. S. 311, 323.

The suit was replevin for certain rails, cars, engines and goods, delivered by the appellant to the Kona Sugar Company, Limited, and sold by a receiver of that company to the appellee with full notice of the appellant's claim. Originally there was a contract for the sale of this property for cash, but the Kona Company having failed to pay, the appellant offerred certain "terms in settlement of the contract" previously made, as follows: "We will take in settlement of this contract the sum of $10,000, U. S. gold coin, and the promissory note of the Kona Sugar Company Limited for the sum of $37,044.53, in favor of William W. Bierce, Limited, payable six months after date at the Whitney National Bank in New Orleans, bearing interest at the rate of seven and one-half per cent. ($7\frac{1}{2}\%$) per annum and secured by First Mortgage Bonds of the Kona Sugar Company, Limited, of par value equal to the note, said bonds being portion of a duly authorized issue not exceeding $200,000. This offer is conditioned upon its acceptance by you, payment of the money and the delivery of the note, with collateral, before 4 P. M. on Thursday, March 14th, A. D. 1901.—Upon such payment being made to us before the hour named, we will deliver to you the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting delivery, upon the express condition and understanding that said rails, locomotives, cars, scales and other materials are and shall remain the property of William W. Bierce, Limited, until the full payment of the note above described, according to its terms." This offer was accepted, this contract took the place of that previously made, and the property was delivered.

For purposes of decision the Supreme Court assumed that, under the foregoing instrument, the passing of title was subject to a condition precedent, but intimated that the majority of the Court thought otherwise, if it had been necessary to decide the point. It was not necessary because the Court was of opinion that, if there was such a condition, it was lost by what was considered an election on the plaintiff's part. The Court below had found that there was no election, and therefore the question was and is whether the acts done by the appellant constituted one as matter of law. If not, then it must be considered whether the sale was on a condition precedent, and those are the two questions of law in the case.

The facts are simple. After the last contract was made the Kona Company got into trouble and a receiver was appointed. The appellant thereupon filed a claim of lien upon the railroad supposed to belong to the Kona Company, for materials used in the construction and equipment of the road, the materials referred to being the property in question. On or about August 1, 1902, it brought a suit to enforce this lien and in November of the same year filed a petition in the Kona Company proceedings asking that a decree already made for the sale of all the Kona Company's property should be modified so as to except all liens from the operation of the sale. Only a part of the property was used in the construction of the road and under any circumstances the claim of a lien would have been bad. The lien suit was dismissed, before anything had been done in it, in January, 1903. On February 13 the appellant, by leave of Court, filed a petition in the Kona Company proceedings for an order that the receiver either should pay the amount due upon its note or deliver the property, setting up the contract and alleging that its title to the property still remained. The abortive lien proceedings constitute the election that is supposed to have brought the appellant's title to an end. We have not gone into further particulars because there can be no doubt that to claim a lien upon anything is inconsistent with asserting a title to it, and may be assumed to be sufficient to manifest an election if one is possible. The appellant's allegations in its first petition could give no additional strength to its choice.

Election is simply what its name imports; a choice, shown by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone. Thus, "if a man maketh a lease, rendering a rent or a robe, the lessee shall have the election." Co. Lit. 145a. So a man may ratify or repudiate an unauthorized act done in his name. *Metcalf* v. *Williams*, 144 Mass. 452, 454. He may take the goods or the price when he has been induced by fraud to sell. *Dickson* v. *Patterson*, 160 U. S. 584. He may keep in force or may avoid a contract after the breach of a condition in his favor. *Oakes* v. *Manufacturers' Ins. Co.*, 135 Mass. 248, 249. In all such cases the characteristic fact is that one party has a choice independent of the assent of any one else. But if a man owns property he has no election to transfer it to another. He cannot make the transfer unless the other assents. And equally, if he owns property subject to be divested by the performance of a condition, he has no election to divest it without performance. The other party must assent. Transfer is very different from election, and requires acts of a different import on the part of the owner, and corresponding acts on the part of the transferee.

In the case at bar there is no pretense that the appellant's conduct purported to convey the property to the Kona Company in advance of the performance of the stipulated conditions. The case stands on election alone, and the appellant had no right to elect in the sense of the argument. It could not obliterate the condition and leave the contract in force. It may be that it had an election to avoid the contract altogether, but, if so, it did not attempt to do it. It insisted on the contract as the ground of its claim to a lien for the price of the goods. The election supposed and relied upon is an election to keep the contract in force, but to leave out the reservation of title. It must be kept in mind that the effect attributed to the assertion of the lien is attributed to it as a strictly unilateral act, not as an offer to which an assent might be presumed. As such an act the appellant could not give it the supposed effect. It is quite true, as we have said, that the assertion of a lien is inconsistent with the assertion of a title, *Van Winkle* v. *Crowell*, 146 U. S. 42, and, therefore, if a lien had been established by judgment or decree, the title would be gone by force of an adjudication inconsistent with its continuance. But the assertion of a lien by one who has title, so long as it is only an assertion and nothing more, is merely a mistake. It does not purport to be a choice, and it cannot be one because the party has no right to choose. The claim in the lien suit, as was said in a recent case, was not an election but an hypothesis. *Northern Assurance Co.* v. *Grand View Building Assoc'n,* 203 U. S. 106, 108. The fact that a party, through mistake, attempts to exercise a right to which he is not entitled does not prevent his afterwards exercising one which he had and still has unless barred by the previous attempt. *Snow* v. *Alley,* 156 Mass. 193, 195.

There remains the question whether the sale was conditional. Such sales sometimes are regulated by statute and put more or less on the footing of mortgages. With the development of its effects there has been some reaction against the Benthamite doctrine of absolute freedom of contract. But courts are not legislatures and are not at liberty to invent and apply specific regulations according to their notions of convenience. In the absence of a statute their only duty is to discover the meaning of the contract and to enforce it, without a leaning in either direction, when, as in the present case, the parties stood on an equal footing and were free to do what they chose.

The contract says in terms that it is conditional and that the goods are to remain the property of the seller until payment of the note given for the price. This stipulation was perfectly lawful. *Harkness* v. *Russell,* 118 U. S. 663. So that the only question is whether any other provision of the contract is inconsistent with this one or qualifies and explains it as intended to do less than it purports to do when taken alone. *Chicago Railway Equipment Co.* v. *Merchants' National Bank,* 136 U. S. 268. The fact that possession was to be and was delivered, and that it must have been contemplated that the rails would be put down upon a roadway no doubt assumed, it seems, wrongly, to belong to the Kona Company, had no such effect, as between vendor and vendee. Neither did the requirement of additional security in the form of first-mortgage bonds of the company. It may have been expected that the mortgage would embrace a part or the whole of this property, but there is nothing more common than a provision in a mortgage that it shall apply to and embrace after-acquired property, with sufficient description to ascertain the same and bring it within the mortgage when acquired. And if the mortgage would have been operative at once by way of estoppel in favor of third persons, there was the more reason for exacting an interest under it to save the vendor's rights in that event. Of course the absolute liability for the price, and putting that liability in the form of a note, are consistent with the retention of title until the note is paid. Parties can agree to pay the value of goods upon what consideration they please, *White* v. *Solomon,* 164 Mass. 516, and when a purchaser has possession and the right to gain the title by payment, he cannot complain of a bargain by which he binds himself to pay and is not to get the title until he does.

It was suggested that the ratification of the contract by the Kona Company did not mention the condition. But it got its rights from the contract and, of course, got only such rights as the contract gave. Some other subordinate suggestions were made, but we have disposed of the only questions that are open here.

Judgment reversed.

True copy.

Test:

Clerk Supreme Court, U. S.